

EMPLOYMENT SECURITY DEPARTMENT

STATE OF WASHINGTON

TRANSCRIPT OF PROCEEDINGS

of

UNEMPLOYMENT INSURANCE RULES

STAKEHOLDER MEETING

Date and Location

January 5, 2004
Department of Labor & Industries
Monday, 9:30 a.m.
Headquarters Building

7273 Linderson Way S.W.

Tumwater, Washington

BE IT REMEMBERED, that an Unemployment Insurance Rules stakeholder meeting was held at the location and time as set forth above. The Employment Security Department was represented by CHERYL METCALF, UI Policy & Training Manager; and JUANITA MYERS, Rules Coordinator. SUSAN HARRIS was also present.

Stenographic reporting was provided by H. Milton Vance of Excel Court Reporting.

WHEREUPON, the following proceedings were held, to wit:

Excel Court Reporting (253) 536-5824
16022-17th Avenue Court East, Tacoma, WA 98445-3310

1

PROCEEDINGS

2

3 MS. METCALF: Good morning. Thanks for coming. I
4 know it was a really difficult drive for some of you.
5 Jan's shaking her head yes.

6 So this is round two of the rules meetings. And I'd
7 like to introduce us. I'm Cheryl Metcalf. I'm the
8 manager of the policy and training unit for unemployment
9 insurance. To my left is Juanita Myers, the rules
10 coordinator for unemployment insurance. And to Juanita's
11 left is Susan Harris who's quickly becoming an expert on
12 rules. She's been a great help. As you know, Juanita has
13 been working furiously and fast to get -- since this
14 legislation passed to get us where we are today. And
15 Susan is working right along with her there. A great
16 team. And they've done an awful lot of work.

17 Today starts the new law. Our whole unemployment
18 insurance staff has been working like crazy to get to
19 today. Our computers are all programmed, up and ready to

20 run the new laws as well as the old laws at the same time.
21 All of our staff at our telecenters have been trained to
22 do both. It's going to be confusing because anybody who
23 filed a claim last week goes by the old rules, and anybody
24 who goes and files today goes by the new rules. And all
25 of our folks have to know which is which and how to apply

1

1 them. So it's going to be an interesting year.

2 We came out on round one of these meetings a few
3 months ago and took all your input, and we had an amazing
4 amount of transcripts. They were about this fat
5 (gesturing). Milton did the first one.

6 And Milton, I'm sorry, I didn't introduce you. I

7 can't remember your last name.

8 THE REPORTER: Vance.

9 MS. METCALF: Vance. And his associate did the
10 second one. And here he is again. We want you to know
11 that we mean business. We have never used a court
12 reporter prior to these. Everybody's input is important,
13 and these are reviewed.

14 Annette Copeland, our assistant commissioner's read
15 both transcripts back to back. And Juanita and Susan have
16 been through them thoroughly and probably have them half
17 memorized just about. We've also gotten written input
18 which has been included and considered.

19 So here we are at this point where emergency rules
20 were filed on Friday. And we need to get input to those
21 emergency rules before they become final. And we want to
22 hear everything you have to say.

23 I'd like for the record for you to go around and
24 introduce yourselves, and then I'm going to turn it over
25 to Juani ta.

2

1 MR. ABBOTT: I'm Bob Abbott with the Washington and
2 Northern Idaho District Council of Laborers.

3 MR. JOHNSON: Dave Johnson with the Washington State
4 Building and Construction Trades Council.

5 MR. HARRINGTON: Joe Harrington, Cement Masons.

6 MR. SEXTON: Dan Sexton, Washington State Association
7 of Plumbers and Pipe Fitters and Sprinkler Fitters.

8 MR. STEVENS: Larry Stevens, National Electrical
9 Contractors Association and Mechanical Contractors
10 Association.

11 MS. GEE: Jan Gee -- spelled G-E-E. And I'm a
12 contract lobbyist representing the Washington Food
13 Industry and the Washington Retail Association today.

14 MR. METCALF: Okay. And then as you speak would you
15 repeat your name so Milton can get it in the record.
16 Thank you.

17 MS. MYERS: We're not using microphones today unless
18 we get a whole lot more people showing up in the next
19 period of time. But we would ask you to wait until you're
20 recognized before you start speaking so that the
21 transcript can be more clear.

22 And what I'll do is I'll go through some of the
23 sections, and then open it up for questions. And just
24 simply raise your hand, and we'll acknowledge you, and
25 then you can say your comments for each one.

1 You have before you a Rule-Making Order which as
2 Cheryl indicated was filed on Friday. These are emergency
3 rules, and they are effective for just 120 days, which
4 gives us time to look at making revisions to them as
5 needed before we adopt permanent rules to obtain input on
6 the draft rules -- excuse me -- on these rules as drafts
7 before we actually take any action to adopt permanent
8 rules.

9 A number of these changes I'm not going to go through
10 because they are simply what we would call housekeeping
11 changes. There are a lot of the rules that are simply
12 updated to recognize changes in the statute numbers, or
13 because we're repealing or adopting new regulations we
14 have to amend another rule to cite the new rule. So

15 there's a lot of what we just refer to as housekeeping
16 changes in here.

17 The pages are numbered. So the first section I'm
18 going to go to is page 3. At the bottom of the page, WAC
19 192-100-010, reasonably prudent person defined.

20 A lot of our decisions in the past have been based on
21 how an individual would act in certain circumstances; is
22 that something a reasonably prudent person would do. This
23 is not a new definition. It's simply for the first time
24 incorporated into regulation. Before, it has been in case
25 law and in policy. But I just wanted to bring it to your

4

1 attention that it's now -- we're incorporating it into

2 rule because we cite the reasonably prudent person
3 standard several times in the regulation as to look at
4 when a voluntary quit or something would be with good
5 cause, we look at the totality of the circumstances and
6 look at what would a reasonably prudent person do under
7 those circumstances.

8 MR. STEVENS: This paragraph is neither yellow nor
9 red nor pink nor blue. Does that mean that this was the
10 same way that it was in the first draft?

11 MS. MYERS: Okay, let me clarify. Thank you. The
12 version that I sent out over e-mail I highlighted with
13 different colors to show what was changed from the
14 previous version.

15 This section is actually what was filed with the code
16 reviser, and it can't be yellow, pink, blue or any other
17 color. It's simply underscoring what's new or citing a
18 new section if it's new or having strike-throughs to show

19 what's being deleted. So you won't see the highlights in
20 here. This definition is -- it is slightly different than
21 what went out before, but it's substantially the same.
22 There are some different wording.

23 MR. STEVENS: I guess I've got a copy that you sent
24 me that's got the colored in it.

25 MS. MYERS: Right. And that's an early version.

5

1 MR. STEVENS: This is not exactly the same as the
2 previous one. Is that what you're saying?

3 MS. MYERS: Yes, right. So the copy you're working
4 with there is -- did you get that off the back table or is
5 that the one I sent you?

6 MR. STEVENS: The one you sent me.

7 MS. MYERS: Okay. She (Ms. Metcal f) is getting you a
8 current version.

9 The version that I sent you is the one that was
10 e-mailed out for comment on December 17th with a request
11 for comments back by the 29th of December. And we did get
12 comments back -- some minor comments, and we got some
13 fairly substantial comments from the Association of
14 Washington Business.

15 So that we made additional changes to these rules
16 based on the input we received and also from further
17 consultations with our legal counsel and staff as to what
18 was confusing about the rules during the training process.

19 MR. STEVENS: We can't tell by looking at this
20 exactly what has been changed.

21 MS. MYERS: No, you can't.

22 MS. GEE: Can you explain that as you go through?

23 MS. MYERS: Yes.

24 The reasonably prudent person definition has been

25 changed somewhat. I think we struck out a sentence. But

6

1 it's not something that would change the meaning of the
2 rule.

3 Hold just one moment please.

4 (Pause in proceedings.)

5 I didn't bring the copy we sent out for clearance,
6 but I think I can remember what most of the comments --
7 what most of the substantive changes were.

8 What we removed from the definition was a sentence in
9 the draft that said such a person acts sensibly, does

10 things without serious delay and takes proper but not
11 excessive caution. Our legal counsel felt that was
12 unnecessary language, and so we simply struck it out of
13 the final version adopted in the emergency rules.

14 The next page, on page 4, of the emergency rules that
15 were filed, there are a couple of new sections.

16 And we'll start the first round of controversy now.
17 WAC 192-110-200, maximum benefits payable.

18 We had a lot of discussion at the last round of
19 meetings about whether -- when the unemployment rate
20 reaches 6.8 percent we drop to 26 weeks permanently or
21 whether that change would go back up to 30 weeks if the
22 unemployment rate went back up above 6.8 percent.

23 In our initial reading of this -- of the rule --
24 excuse me -- of the statute was that it was a fluctuating
25 number of weeks depending on the unemployment rate in

1 effect.

2 After further input and consideration, the
3 commissioner has decided that the most appropriate reading
4 of the statute is that when we hit 6.8 percent it goes
5 down to 26 weeks and remains at 26 weeks.

6 The other piece with that section of the law is what
7 unemployment rate do we use to determine six point -- six
8 -- when we reach 6.8 percent. The statute simply says the
9 unemployment rate. There is nothing that we call the
10 unemployment rate. There are the insured unemployment
11 rate, the total unemployment rate, the seasonally adjusted
12 unemployment rate, and a three months seasonally adjusted

13 total unemployment rate.

14 At the first round of meetings we discussed using the
15 three month seasonally adjusted unemployment rate which is
16 the rate we use to determine when a state triggers on and
17 off of extended benefits. That is the rate that was
18 discussed and was agreed upon during the first round of
19 meetings. We've had some concerns raised since then that
20 whether that was an appropriate selection, but we feel
21 that it is the best determiner of what the trend for
22 unemployment is rather than -- some of the others just
23 give spikes up and down based on the month. The three
24 month seasonally adjusted looks at the same pattern of
25 unemployment over that three-month period as compared to

1 the same period in the previous year. So that's what
2 we've included in the definition of when we decide or when
3 we determine we're going to 6.8 percent or less.

4 The controversy came up because the seasonally
5 adjusted total unemployment rate has hit 6.8 percent. And
6 we had some questions as to whether we had dropped to 26
7 weeks. And we said no because we were using -- we had
8 agreed to use a three-month seasonally adjusted. And
9 there have been some concerns expressed about that. But
10 the three-month seasonally adjusted I believe is at 7.1
11 right now.

12 We just felt it would be very difficult to drop to 26
13 weeks at an earlier point than most of the predictors of
14 the bill had indicated that we would. There was no
15 discussion in the record that we could find anywhere where
16 they discussed which unemployment rate would be used. But

17 we did find some information indicating that people
18 thought that the unemployment rate wouldn't hit 6.8 until
19 sometime in 2004 or even 2005. It doesn't look even with
20 the three month seasonally adjusted that it's going to
21 wait until 2005, but it didn't appear that it was an
22 expectation that it would happen in December of 2003.

23 MR. JOHNSON: Juani ta?

24 MS. MYERS: Yes.

25 MR. JOHNSON: Can we ask questions?

9

1 MS. MYERS: Certainly.

2 MR. JOHNSON: Understanding the commissioner's
3 decision, we would still disagree with the idea that 6.8
4 is just a threshold that once we drop below it it locks

5 the number of weeks into 26. Our understanding was in
6 talking to the legislators and throughout the process that
7 that was going to be just sort of a benchmark in terms of
8 whether we were at 30 weeks or at 26 weeks, and once the
9 rate rose above 6.8 then we would go into the 30 week
10 benefit period. And I just wanted to make sure that that
11 was part of the record that we still understand it to be
12 that way even in light of the commissioner's decision.

13 MS. MYERS: We recognize that. And we also recognize
14 that whichever way we ruled, it would probably be subject
15 to litigation either way. But the input that the
16 commissioner received -- well, I think I can just say it
17 was from Senator Honeyford who was the sponsor of the bill
18 -- was that the intent was that it go to 26 weeks and stay
19 at 26 weeks.

20 And you know, we advised -- the Department advised

21 Senator Honeyford that we would certainly adopt that. It
22 is not our intent to change legislative intent in any way.

23 But certainly the statute could be read in either
24 way. And whichever way the Department ruled we believe
25 that there would be litigation resulting from this simply

10

1 because the statute is not crystal clear.

2 Dan?

3 MR. SEXTON: Juanita, Dave put it very well I think.
4 My question is: I understand what you just said. I think
5 you said prior to that that there was no testimony? I
6 know you received testimony from Senator Honeyford saying
7 that it's to stay at 26 weeks. But I believe you said in
8 prior comments that you received no testimony saying that

9 it shoul dn' t. Is that correct?

10 MS. MYERS: That is correct.

11 MR. SEXTON: Or I believe you said that you coul dn' t
12 find anything in the record or any testimony; is that
13 right?

14 MS. MYERS: Okay, what we found in the record on thi s
15 subject is some testimony on the floor which said when the
16 unemployment rate reaches 6.8 percent we drop to 26 weeks.
17 It didn' t say anything further beyond that.

18 Where I said there was nothing in the record at all
19 is whi ch unemployment rate we use.

20 We found several places in the record -- in written
21 record and in the floor debate where they did say when we
22 reach 6.8 percent unemployment rate, the maximum benefi ts
23 will drop to 26 weeks from 30. They don' t say that it
24 stays there. They don' t say that it' s -- it can go back

25 up again. They're silent on the subject as to whether it

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1 stays or could go back up again.

2 MR. JOHNSON: Just one additional comment so it makes
3 it into the record. And that is: No matter what Senator
4 Honeyford submitted to the commissioner's office, there is
5 a reasonable assumption there that that is being used as a
6 benchmark to determine the number of weeks available to a
7 claimant and not just a sort of lock-in figure that once
8 we drop below 6.8 we're going to go to 26 weeks, and even
9 if unemployment shoots up to 10, it stays at 26 weeks.
10 Once again, the intent and our understanding was that that
11 was to be, you know, a benchmark to determine the number
12 of weeks. And I think if we go back to the new prudent

13 person language, I think that a prudent person reviewing
14 that information would make that same assumption.

15 MS. MYERS: Thank you.

16 Jan?

17 MS. GEE: I would just like to go on record as a
18 member of the AWB worker comp -- or UI committee that
19 submitted the letters, we agree with the interpretation
20 that the Department placed in this section of the rule.

21 MS. MYERS: Thank you.

22 Okay, the next new section which was not in the draft
23 that was e-mailed out is the following section, and we are
24 on page 4 of the emergency rules, the section called
25 "Claim cancellation."

1 We had a lot of discussion internally about what
2 happens if somebody wants to cancel a claim which there is
3 nothing in the law prohibiting a person from canceling
4 their unemployment claim at any time and refiling with a
5 new effective date.

6 For example, somebody applies for unemployment
7 benefits in December, draws benefits and, for example,
8 say, they quit their job, and we determine that they had
9 quit their job with good cause under the law in effect at
10 that time, and then they realize, "Wait, if I filed in
11 January, I might have had a higher weekly benefit amount.
12 So I'd like to cancel my December claim and refile a new
13 claim in January." Now, they can do that. But what we
14 wanted to make clear is if they do that, they're falling
15 under the new law. Because the new statute regarding
16 quits and discharges applies to the effective date of the

17 claim, not the job separation date. So if somebody quit
18 their job in December, but they cancel their existing
19 claim and refile a new claim in January or February or
20 whenever, we would say, "Okay, you've canceled your claim,
21 so that eligibility decision which was determined under
22 the old law is void. We're going to reconsider your
23 eligibility based on the law that covers the effective
24 date of your claim." And so that individual may or may
25 not have had good cause for quitting work depending on

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1 their reasons and whether it's covered by the new statute.
2 So this is the first time we've had a statute
3 covering these types of eligibility decisions that apply

4 to the effective date of the claim as opposed to the
5 separation date from the job. So we put this in here to
6 make clear to people that there are risks for changing
7 their claim effective date, that they could lose
8 eligibility. So we advise people of this when they are --
9 it's included in our new telecenter script that we read to
10 claimants who call in and they may want to cancel a claim,
11 but certainly the choice of whether to do it is theirs.

12 And Dan, you had a question?

13 MR. SEXTON: Juanita, it just, you know, kind of
14 crosses my mind or -- I wonder the folks that are in this
15 situation right now, were they notified about this? Were
16 they -- you know, anyone who was advised that, you know,
17 you could cancel this claim and refile next week, you
18 know, and maybe monetarily your situation would improve,
19 were they advised about this?

20 MS. MYERS: Yes.

21 MR. SEXTON: They were?

22 MS. MYERS: Uh-huh.

23 MR. SEXTON: Okay.

24 MS. MYERS: Yeah. People are warned of the
25 ramifications before canceling a claim.

14

1 What we anticipate happening more than likely is
2 there's going to be people who want to backdate their
3 claims. And there are certainly -- there are other rules
4 governing when an individual can backdate a claim. It has
5 to be for good cause.

6 We anticipate -- for example, people laid off after
7 the -- you know, who may have had a temporary job at

8 Christmastime may have been laid off last week, and they
9 elected to wait to file their claim until this week. But
10 that happens a lot of times at what we call quarter change
11 when somebody's weekly benefit amount can go up or down.
12 The difference will be for people who quit or were
13 discharged from work, that could impact their eligibility
14 for benefits depending on when they quit their job. So
15 that's probably going to be a limited number of cases.
16 But we just wanted to clarify what was going to occur.

17 Dan?

18 MR. SEXTON: So my question is: The people who were
19 laid off on Friday, were they advised about the new rules
20 that if you don't file last week, if you don't file on
21 Friday, you're going to be under the new rules. If you
22 wait until Monday, you're going to be under the new rules
23 on Monday?

24 MS. MYERS: There's no way to notify those people
25 because they don't have a claim yet, and we don't know

15

1 who's going to be laid off on any particular week. We
2 sent notification to people who actually did call. We
3 have a normal what we call a quarter change script where
4 people who did file their claim last week were given some
5 information if it appeared that there could be advantages
6 to waiting or not waiting were given information. But
7 people who lost their jobs last week and simply waited to
8 file this week, there's no way of notifying those
9 individuals simply because we don't know who's losing
10 their jobs out there.

11 Larry?

12 MR. STEVENS: This may be a real naive question, but
13 I just wonder: Why do we -- it appears that there's -- a
14 -- that people are allowed to file a claim, they are laid
15 off, they are allowed to file a claim, then they're
16 allowed to say, "Oh, I want to change that. I don't want
17 to file a claim." What's the philosophy behind allowing
18 people to change their filing of a claim?

19 MS. MYERS: It's more that there's nothing
20 prohibiting it. You don't have to keep a claim you file.
21 Now, if you've received payments under that claim already,
22 certainly those are going to be deducted from your new
23 claim. You aren't going to be able to file one claim,
24 draw all the benefits out, cancel it and get a new claim.
25 They would be -- say, if you've already received \$2,000

1 from your current claim, and then you decide to cancel it,
2 we will offset it a hundred percent. So you wouldn't get
3 any benefits out of your new claim for a period of time
4 until that \$2,000 was recovered.

5 MR. STEVENS: But because there's no prohibition,
6 somebody who gets laid off and figures they'd better go
7 file for unemployment, they go file, and then their buddy
8 tells them, "Hey, if you wait till next week, you make
9 more money," there's no prohibition for --

10 MS. MYERS: There's no prohibition.

11 And actually it happens a lot of times for people who
12 -- they're laid off for a period of time, and they're not
13 certain how long they're going to be laid off, and so they
14 file their claim, but before they even draw a check,

15 they're back at work. And so they never use the claim.

16 I mean, that's more frequently when it happens where
17 people when they come six months later to file, they say,
18 "I'd like to cancel that old claim. I never got any
19 benefits under it, and I'm a substantially higher weekly
20 benefit amount now, and I'd like to take advantage of this
21 one." That's where it more commonly happens, but it does
22 happen around what we call quarter change fairly
23 frequently. And usually about two or three weeks before
24 what we -- before the end of the quarter we will -- our
25 staff will check to see what the weekly benefit amount

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1 would be if they waited, and we would advise them of that

2 and say, "Okay, if you file today you'll get \$300. If you
3 wait until January 1st you'll get \$320. So then the
4 person has to decide is it worth their time to go without
5 benefits for three weeks to get the additional \$20 per
6 week starting in January or if they'd rather just go ahead
7 and file now.

8 Where this happens more is because we do take claims
9 where people aren't speaking to an individual. They are
10 filing on the Internet. About a third of our claims right
11 now files via the Internet. So they aren't speaking to a
12 person, so they don't know that their weekly benefit
13 amount could be higher.

14 MS. METCALF: Can I --

15 MS. MYERS: Certainly.

16 MS. METCALF: This is all part of a claims option
17 that is more than just the weekly benefit amount. If a
18 person has wages in two or more states or any combination

19 of other things, that we need to tell them what their
20 options are so they can make their choices. It's a part
21 of our policy. There's often three or four different
22 options that a person could have.

23 MS. MYERS: The next page, page 5, 192-130-060,
24 Notice to employer. The changes in that from the existing
25 rule, not from the draft that was sent out, but from the

18

1 existing rule are that we will send a notice to the
2 employer -- to the last employer; excuse me -- when an
3 individual has a potential disqualification. For example,
4 the individual reports that they were laid off, but it's
5 only been four weeks, and we have to check -- we'll check

6 with the employer by sending a notice to the employer and
7 saying, "Were they really laid off?" Because if they have
8 -- if they were, in fact, fired or quit, then they haven't
9 -- enough time hasn't elapsed to purge their potential
10 disqualification. So we need to check with the employer.

11 And the change on that is the subsection -- what is
12 it -- (1)(b) with the little (i) for claims with an
13 effective date prior to January 4th if it's been less than
14 seven weeks. And then the next section says for claims
15 with an effective date January 4th or later it's been less
16 than ten weeks. Because while the quit is still a seven
17 week qualification period, it is now ten weeks for
18 discharges. And so if the separation was within ten
19 weeks, we'll need to contact the previous employer to say,
20 "What was the real reason this person was separated from
21 employment?" And certainly if there's a lack of work,
22 usually the employer doesn't respond. But it gives the

23 employer an opportunity to let us know if it was other
24 than a layoff.

25 Also in the new subsection (3), again, that was in

19

1 the draft rules. But it's a change from what the current
2 rules say. There is a new statute that provides that in
3 certain circumstances an individual who quits work with
4 good cause, all the charges are their claim will go to a
5 single employer. And that's the separating employer.
6 That's primarily for if somebody who leaves work -- quits
7 work because of safety issues, illegal activities, a
8 change in the work site, reduction in hours and wages and
9 so on, the new statute provides that those individuals'

10 benefits will be charged to that separating employer if
11 that separating employer is their last employer --
12 base-year employer and pays taxes as opposed to
13 reimbursing the trust fund.

14 So we've also added a new notification. When an
15 individual applies for unemployment benefits, and it
16 appears from their initial statement that this may be the
17 case, we will send a notice to the employer saying, "The
18 claimant has indicated this is the reason they left work.
19 You may be liable for 100 percent of the benefits on the
20 claim." And then they'll get a following letter if that
21 case works out to be true. Because sometimes the
22 adjudication process for the claimant is for some period
23 of time down the road. But we wanted to make it clear to
24 the employer that they may want to pay attention to the
25 notice to employer that comes out because they could --

1 depending on how we rule as far as the reason for the quit
2 -- they could be liable for 100 percent of charges.

3 MR. SLUNAKER: Do you anticipate that -- will these
4 notices be changed at all to the employer? Is it still
5 going to look the same as it used to? Or -- my question
6 is: Is there going to be a big bright pink piece of paper
7 or something so that people will understand that it's not
8 just regular junk mail?

9 MS. MYERS: Well, it's not a bright pink piece of
10 paper. But it's a separate letter now that guess out.
11 And I can't remember what exactly it looks like. I can
12 get you a copy.

13 MR. SLUNAKER: Yeah, I'd like to see that. I just

14 think it's -- what we're trying to do is get our people to
15 pay attention. And one white piece of paper looks just
16 like another one.

17 MS. MYERS: Right.

18 MR. SLUNAKER: And without having to put stuff in the
19 law that says ten point type or something, it would be
20 really helpful if the Department would --

21 MS. MYERS: Right. I think it says in its
22 introductory paragraph that you may be liable -- "This
23 individual has applied for benefits, and you may be liable
24 for 100 percent of the benefits paid on this claim," which
25 we hope will catch their attention.

21

1 MR. SLUNAKER: Nice bold type or something.

2 MS. MYERS: But we'll take a look at it and get you a
3 copy.

4 The next section is just a -- some housekeeping
5 changes. Page 6, 192-130-070, mailing of eligibility
6 determinations. This is also information for the employer
7 to let them know who's going to receive copies of our
8 decisions about the job separation.

9 The new (1)(c) is for claims, effective date prior to
10 January 4, 2004. We'll mail to any employer since the
11 beginning of the claimant's base year who provided
12 information that the claimant was discharged for a felony
13 or gross misdemeanor.

14 And the next section (d) is for claims effective
15 January 4, 2004 or later. We'll notify anybody who
16 provides information that the claimant was discharged for
17 gross misconduct connected with the work or whose wage

18 credits are deleted from the claimant's record as a result
19 of the claimant's gross misconduct.

20 And as we get into -- when I talk a little further
21 down the road about the misconduct rules, for those of you
22 who recall, there is a new penalty for individuals who are
23 discharged for gross misconduct. The previous statute
24 said that somebody who's discharged for a gross
25 misdemeanor or a felony, all the wages from that employer

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1 would be deleted. The new statute says all the wages from
2 that employer or up to 680 hours from their base year,
3 whichever is higher. So if an individual was hired by an
4 employer and they were discharged for gross misconduct but
5 had only worked 100 hours for that individual employer, we

6 would still take 580 hours off their claim. That's in the
7 statute. And so this says we will notify those employers
8 whose hours are removed from the claim even though they
9 didn't have -- they may not have committed gross
10 misconduct against that employer, we're removing hours
11 from their claim based on their gross misconduct from
12 another employer. So we'll copy that employer just to let
13 them know why they aren't being -- they wouldn't be taxed
14 for those charges.

15 Dave, you look like you had a question.

16 MR. JOHNSON: Well, there again, our understanding
17 was when the phrase is structured or the sentence is
18 structured "up to 680 hours," that the hours that would be
19 discounted from the 680 hours would be the hours that had
20 been worked for that particular contract or that
21 particular employer, not all other subsequent employers up

22 to 680 hours. Is there a threshold there? Or is it if
23 somebody -- now, just to clarify it in my mind, are you
24 saying that if somebody is out there working for an
25 employer and they get terminated for -- and it's

23

1 determined that it's gross misconduct, are they
2 automatically -- is 680 hours automatically eliminated
3 from their account, and you're calling back the other
4 employers to say, "Hey, he worked for you for 90 hours,
5 you're not going to be taxed on that." "He worked for you
6 for 60 hours, you're not going to be taxed on that"? Well
7 then what does "up to" mean?

8 MS. MYERS: Okay, the statute actually doesn't say
9 "up." I'll read that section of the statute.

10 MR. JOHNSON: Oh, okay.

11 MS. MYERS: It says, "An individual who has been
12 discharged from his or her work because of gross
13 misconduct shall have all the hourly wage credits based on
14 that employment or 680 hours of wage credits, whichever is
15 greater, cancelled." So it's not an "up to." It's all
16 wages for that employer --

17 MR. JOHNSON: My misunderstanding. I thought you
18 said up to 680 hours.

19 MS. MYERS: So this is a new penalty. And the
20 section of this just lets the employers know that they
21 will be notified.

22 The next sections are simply housekeeping changes all
23 the way down to --

24 MR. SLUNAKER: I have another question about the --
25 on these separation issues. There's nothing in here that

1 indicates how long the Department is going to give itself
2 to make those determinations. Do you anticipate some sort
3 of a policy directive? Or how are we going to -- you
4 know, there are deadlines in here for employers and
5 employees to respond. How long is the Department
6 anticipating it's going to give itself?

7 MS. MYERS: We have -- it's not a policy. We have
8 guidelines that are issued by the Department of Labor
9 called desired levels of achievement you'll hear referred
10 to as DLA's where we have some guidelines as to when we
11 should issue decisions. I'll be frank with you that
12 sometimes we don't make those because of staffing,

13 workload.

14 MR. SLUNAKER: Sure.

15 MS. MYERS: You're probably all aware that we've had
16 reductions in funding from the federal level as to how
17 much our staff we can retain.

18 I can't tell you no, we aren't going to put it in
19 policy. It's -- we have the desired levels of
20 achievement. We try our best to reach those. But it's
21 simply a matter of case load and staffing volume.

22 I imagine it might take a little longer to issue some
23 of these decisions at least initially as people become
24 familiar with the new law. But no, that's the only answer
25 I could give you.

1 MR. SLUNAKER: I understand that. And I wasn't
2 intending to put you on the spot. But it would be
3 probably beneficial to factor into the present
4 communication that we anticipate some decision within a
5 certain time frame, just sort of kind of provide everybody
6 with a general tickle mechanism that employers and the
7 Department can look to to say, "Okay, if we pass that, we
8 may have something going on that needs to be addressed."
9 But just to try to get some indication that "Okay, I as an
10 employer have to respond within a certain period of time.
11 What do I have a reasonable expectation to see from the
12 Department?"

13 MS. MYERS: Dan?

14 MR. SEXTON: Well, you know, I find it interesting
15 here that, you know, all the subheadings here all have to
16 deal with information from the employer. And, you know,

17 if the employer does not respond within ten days, if the
18 Department receives -- or -- (3) and (4) I think are
19 pretty important. If the Department -- (3) is if the
20 Department receives information from the employer after
21 the end of the ten day response period but before the
22 decision. And then (4) is after the decision. There's
23 nothing here on any provisions for rebuttal information.
24 MS. MYERS: Those are for the claimant. Those are
25 contained in WAC's which we didn't amend.

26

1 MR. SEXTON: Okay. So would they still correspond to
2 (3) and (4)? And so if the employer -- whenever the
3 employer puts their information in, then there's still
4 corresponding time lines on the rebuttal?

5 MS. MYERS: Correct. We -- the claimants always have
6 an opportunity -- well, either party always has an
7 opportunity to provide rebuttal information. So if we
8 receive information from the employer that is different
9 from what the claimant told us, we would contact the
10 claimant and say, "Here's what your employer said." And
11 vice versa. The employer responds. And then when we get
12 the information from the claimant and it's very different,
13 we would contact the employer and say, "You said this, but
14 here's what the claimant told us. Do you have any
15 response?"

16 We certainly do provide rebuttal opportunity whenever
17 we receive conflicting information.

18 So that's not in here simply because that rule hasn't
19 changed. That rule is in effect.

20 Okay, we're going to skip up to page 14, the interim

21 sections in there were primarily housekeeping changes. In
22 fact, they were all housekeeping changes.

23 And we're going to move into the section on voluntary
24 quits.

25 Do we want to take a quick ten-minute break here

27

1 before we get going again?

2 UNIDENTIFIED: Yes.

3 MS. MYERS: Okay.

4 MS. METCALF: I forgot to do my housekeeping duties.

5 Restrooms are to the left through the double doors and

6 then again to the left. And there's a stairway right

7 there that goes to a cafeteria that's just about directly

8 above where we're sitting right now.

9 MS. MYERS: So if you could all be back at 10:30,

10 that would be great.

11 (Recess taken.)

12 MS. MYERS: Okay, page 14, let's take a look at
13 mandatory military transfers. No substantive changes from
14 what went out in draft. But just to let you know that
15 this is a new rule.

16 The previous law allowed benefits to an individual
17 who quit their job to accompany their spouse when their
18 spouse was transferred by the employer. The new statute
19 limits that to individuals who quit to accompany a spouse
20 who's being transferred by the military. "If they
21 relocate to a state that also allows benefits for
22 individuals who quit to accompany a military spouse" is
23 the wording of the statute.

24 So we have done a survey. We found 15 states that

25 allow good cause, and also -- no -- 15 states that allow

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1 good cause for this reason. And so if the individual is
2 transferred by the military to one of those 15 states, and
3 their spouse accompanies them, they could receive benefits
4 being found to have quit work with good cause.

5 If they are transferred to a state that does not
6 recognize this as a good cause reason for leaving work,
7 but the spouse quits to accompany them anyway, it is not
8 good cause.

9 Yes?

10 MR. HARRINGTON: What if it's overseas?

11 MS. MYERS: The same thing. The state -- the law

12 says they have to have moved to another state that allows
13 this as good cause. So if they transfer overseas, and
14 their spouse quits to accompany them overseas, they do not
15 -- that spouse does not have good cause for leaving work.

16 MR. SLUNAKER: I have a question. Are you going to
17 publicize those 15 states in some sort of a circular or
18 something?

19 MS. MYERS: We have something that we've given to our
20 staff. We could certainly share it with you. We'd be
21 happy to.

22 MR. SLUNAKER: Yeah, that would be -- I think that
23 would be useful.

24 And then I have a question about part (3). Is that
25 an extension of the definition of military --

1 MS. MYERS: No.

2 MR. SLUNAKER: And is that what we currently use?

3 MS. MYERS: That's what we currently use as far as
4 those people get when they leave work either a DD-214 or a
5 similar document when they're discharged, and these are
6 the people who are eligible for veteran services. And
7 it's limited to the commissioned officers with NOAA and
8 the public health service.

9 I think the only two areas we're waiting to hear back
10 from are Puerto Rico and the Virgin Islands. They have
11 not responded as to whether they would allow good cause
12 under these circumstances. The District of Columbia does
13 not. So if somebody moved -- was transferred to the
14 Pentagon or to D.C. or somewhere, they wouldn't have good
15 cause. But we've heard back from all the other states.

16 And we'll have to review them probably every year because
17 states change their laws, you know, all the time. And so
18 we'll have to do a new survey probably every year just to
19 keep current on where an individual has good cause.

20 MR. SLUNAKER: That was my point. Maybe when you'd
21 make that annual review if you at the beginning of the
22 year or whenever you do it just in the regular course of
23 events put it up on the website or something so anybody
24 who has a question can easily find out.

25 MS. MYERS: Okay. Certainly.

30

1 MR. SLUNAKER: It would probably save some complaint
2 calls.

3 MS. MYERS: Any further questions on that section, on

4 that rule?

5 The next one is 115, Reduction in compensation of 25
6 percent or more. We have defined what usual compensation
7 means. It's the amount that you've actually been paid.
8 Or if you haven't yet been paid because you just started
9 work, what the amount that was agreed upon by you and your
10 employers, part of your hiring agreement.

11 To constitute good cause under this section, the
12 employer must have taken action to reduce your pay. An
13 individual couldn't say, "Well, I want to change to a
14 different job that's lower pay" and then say "Oh, but now
15 I have good cause to quit because it's 25 percent or
16 less." That's not allowable under this. The employer has
17 to have cut your pay by 25 percent or more.

18 We will look at the number of reductions from the
19 beginning of your base year to determine whether you've

20 experienced a 25 percent reduction or more. We had some
21 concerned raised -- or discussed in the previous
22 stakeholder meetings that what if the employer does ten
23 percent, waits a few months and does ten percent and waits
24 another few months to do ten percent again. Certainly the
25 consensus from the employer community was their intent was

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1 not to allow any employers to game the system or to take
2 advantage of the law in that way.

3 So we'll look at from the start of their base period
4 which would be about 15 months prior to the date they
5 applied for unemployment benefits to say, "Okay, what's
6 been your reduction in salary over that period of time?"

7 Or sometimes employers just have to institute

8 reductions incrementally in an attempt to reduce costs and
9 so on.

10 MR. JOHNSON: Juani ta, in RCW 50.04.320, we -- in one
11 of the stakeholder meetings we discussed that definition
12 of remuneration. Without having that in front of us, does
13 that include --

14 MR. SEXTON: Everything.

15 MS. MYERS: Yes. Compensation means the same
16 definition as remuneration which is basically pay -- any
17 compensation in lieu of salary that's provided as part of
18 your payment.

19 MR. JOHNSON: So if you were provided with a vehicle,
20 and they took that away at some point during your base
21 year, you guys would fix a percentage rate to that and any
22 other --

23 MS. MYERS: Right, right. Certainly.

24 DMR. JOHNSON: -- form of compensation that went
25 along with the job?

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1 MS. MYERS: The same as if your -- they stopped
2 covering your medical or they substantially increased your
3 copay on your medical or -- there's a -- it considers all
4 those different benefits. So we've just simply adopted
5 their definition of remuneration that is already contained
6 in statute.

7 Okay, the next section 120, reduction in hours of 25
8 percent or more.

9 Again, the usual hours are the hours of work that are
10 agreed on by you and your employer as part of your hiring
11 agreement. Or for seasonal jobs, the number of hours you

12 customarily work during the season. For example, if you
13 -- the example that came up at a previous stakeholder
14 meeting, say you took a job because the employer said, "I
15 will always have overtime. This job is 60 hours a week."
16 And you had another possibility of a job that was a normal
17 40-hours-a-week job and you took this one because you
18 wanted the overtime. So the employer then says -- comes
19 down the road and says, "You know, I'm going to reduce
20 your hours to 40 hours a week." While that may be
21 standard for the occupation and industry, it's not what
22 you agreed to -- what you and your employer agreed to as
23 part of your hiring agreement. So we would consider that
24 a reduction in hours. It's not just going by what's
25 customary for the occupation in that area; it's going by

1 what you and your employer agreed you would be hired to
2 do.

3 Again, to constitute good cause for quitting, the
4 employer action must have reduced -- caused the reduction
5 in your usual hours. Again, you can't say, "I'd like to
6 switch to a part-time job," and then quit with good cause
7 saying, "Well, my hours were reduced." In that case, you
8 did the reduction through voluntary action on your own.
9 And so it's not good cause for quitting work.

10 Again, we will also look at the reductions in hours
11 since the beginning of the base period through the date of
12 separation to determine whether the hours were reduced 25
13 percent or more. And we aren't going to look at any
14 temporary overtime.

15 For example, if you get a job that says -- well, you

16 know, you're in a job, and the employer says, you know,
17 "For the next two weeks we've got a real push, and I'm
18 going to ask you to do overtime work six days a week or
19 seven days a week. For the next period of time we'll pay
20 you overtime." And then that ends, and you really liked
21 those paychecks, it still doesn't constitute good cause
22 for quitting because you had to do some temporary
23 overtime. That's not your usual hours of work.

24 Any questions about that?

25 Okay. Change in worksite.

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1 To constitute good cause for leaving because of
2 change in the worksite, the location of your employment

3 must have changed due to the employer action. For
4 example, if you live in Olympia and you took a job in
5 Shelton, and that's -- and you said, "Okay, that's -- you
6 know, that's where my job is," and then you personally
7 decide to move to Kelso, now, granted that's a long
8 commute, but the employer didn't do anything. The
9 employer stayed where the employer was at the time you
10 took the job. The employer has to have relocated the
11 business to constitute good cause under this section. So
12 if the employer closed the plant in Shelton and relocated
13 out to Aberdeen or something, that would be -- that could
14 be good cause for quitting your job, depending on your
15 individual circumstances and what your occupation is.

16 The change must have either substantially increased
17 the distance you have to travel to the new worksite or
18 increased the difficulty or inconvenience of the travel,
19 and the commute distance or time now has to be greater

20 than what is customary for workers in your job
21 classification and labor market area.

22 So this is a change from the current law that we
23 discussed before the hearing got started, that under
24 current law if you know where the -- even if we know where
25 the job is, if it's outside your normal commute distance,

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1 and you take that job, say a stop-gap employment, and then
2 quit because the commute is just too difficult, you would
3 have had good cause if that's beyond the normal commute
4 distance. Under the new law which took effect yesterday,
5 the employer has to change the worksite. If you knew
6 where it was when you took the job and simply quit because

7 of the distance, that's not good cause for leaving work.
8 The employer had to have moved the worksite, changed the
9 location.

10 Dan, did you have a question?

11 MR. SEXTON: Well, maybe I have a question. It
12 doesn't really seem to be any solid time frame down here,
13 you know, what the reasonably prudent person would think,
14 you know, in the difficulty of the commute.

15 So say I'm working in Olympia and my job is finished
16 in Olympia, and my employer has got a job in Everett, and
17 so I drive up there for a week. And then on Friday I see
18 that, you know, it takes me ten hours to get home from
19 Everett, you know, and I didn't know that. When I took
20 the job I was working in Olympia, and then I went up there
21 for a while and I worked there for a while. But then I
22 saw, you know, how bad that commute was. And so, you

23 know, there's not really anything --

24 MS. MYERS: There isn't.

25 MR. SEXTON: So those situations would just have to

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1 be figured out, and maybe it would be allowed and maybe

2 it wouldn't. Am I reading that right?

3 MS. MYERS: Correct. It would be determined on an

4 individual basis, taking into account the totality of

5 the circumstances. Because they would look and say,

6 "Okay," --

7 MR. SEXTON: There's nothing here black and white --

8 MS. MYERS: No.

9 MR. SEXTON: -- that says that I couldn't work there
10 for a week and then decide, or I couldn't work there for

11 two weeks and then decide that the commute was too bad.

12 MS. MYERS: No. No, there isn't.

13 MR. SEXTON: Just as long as I was working somewhere
14 else first.

15 MS. MYERS: Right. Your job -- you took the job --

16 MR. SEXTON: Right. They changed the worksite, and
17 then, you know, two weeks later, you know, I suffered
18 through it for two weeks or whatever, and then I go to
19 them and tell them, you know, "This isn't what we agreed
20 to."

21 MS. MYERS: Right. And the primary reason you quit
22 work was the fact that the employer changed the worksite,
23 and it's now beyond a reasonable commute distance for your
24 occupation and labor market area.

25 MR. SEXTON: Right. There's nothing here that says

1 that couldn't happen.

2 MS. MYERS: No. Okay.

3 MR. SLUNAKER: I have a question about (2)(b). I'm
4 trying to reconcile the first sentence that says the
5 geographic area where most people work, and then the
6 second one talks about geographic coverages of particular
7 labor unions. I guess I'm not sure what the relevance of
8 that is. I'm trying to compare that to the first
9 sentence. I mean, if the idea is the labor market area
10 isn't by definition a union geographic coverage, the labor
11 market area?

12 MS. MYERS: Not necessarily. For example, there are
13 some unions in the state that have -- their jurisdiction
14 is the entire state, but they don't expect people that

15 they're referring from Yakima to come to jobs in
16 Bellingham. They would call that Yakima worker when there
17 were jobs in the Yakima vicinity. That doesn't mean that
18 the person has to be available for the entire state just
19 because the union covers the entire state.

20 MR. SLUNAKER: Except that in your example, the
21 majority of the workers worked in Bellingham, and that
22 worker was in Yakima, that could --

23 MS. MYERS: That could be different.

24 MR. SLUNAKER: -- the eligibility when that's not the
25 intent.

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1 MS. MYERS: That's not the intent. What we're

2 talking about is what -- where the number of -- where the
3 workers customarily obtain their work.

4 As part of the decision from the Court of Appeals in
5 the case of NECA versus Employment Security, the one case
6 involved an individual who lived in I think it was
7 Bremerton and sometimes took jobs over in Seattle. And
8 because they didn't routinely take jobs in Seattle there
9 was a question about their availability for work. Well,
10 what would happen is he would -- because he commuted he
11 took jobs that were within walking distance of the ferry
12 landing in Seattle. He didn't take jobs normally in the
13 Seattle area. And the Court of Appeals said that unless
14 the employer could demonstrate that that individual --
15 people from that individual's area customarily took jobs
16 in the Seattle area, then that person wasn't obligated to
17 do so simply because they could. So that's part of the
18 decision.

19 And we do have some unions that cover the entire
20 state. Now, if it's routine for them to dispatch people
21 all over the state, I don't know where that occurs, but if
22 it did, then that could be a different factor.

23 For example -- the example we've used -- although,
24 this isn't with unions, but somebody who lives down here
25 in Olympia and they're an aircraft mechanic, more than

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1 likely they need to be available for work in King or
2 Snohomish County because that's where the jobs are.
3 Whereas, if they had another occupation -- plumber, pipe
4 fitter, sprinkler fitter -- they could be -- you know,
5 there are occupations -- there are jobs down here for

6 people with that occupation, and they aren't required to
7 be available for a broader distance. It depends on where
8 the jobs are.

9 If in your example, the individual lived in Yakima,
10 but all the jobs were in Bellingham, then yes, they would
11 be expected to be available for work in Bellingham. But
12 if there are jobs also available routinely in Yakima area,
13 then they aren't expected to go to Bellingham to go for
14 work. Just because they have a dispatch hall in one part
15 of the state and it covers the entire state, if they break
16 it up as to who's contacted for jobs based on their
17 geographic area, then that's what they have to be willing
18 to do is to travel within that area designated by their
19 union.

20 MR. SLUNAKER: Well, I'm not going to -- you know, I
21 guess of all these areas, this is probably one that -- you
22 know, we're sitting here a year from now, we may have a

23 stack of examples of things that we spent a lot of time on
24 that maybe need to be clarified. But I can see this
25 potentially being a problem, particularly of concern.

40

1 MS. MYERS: Okay.

2 MR. SLUNAKER: I mean, if you're a machinist and they
3 want to transfer you from Everett to Renton and you live
4 in Mount Vernon, how are you guys going to figure out
5 where the majority of those people work? Is the -- is it
6 the SMSA around Seattle that goes clear up in Everett and
7 clear down, or is it something different? I mean, I don't
8 know. And those are fixed -- let alone the variability of
9 worksites around the broader geographic area.

10 MS. MYERS: Okay, thank you.

11 The next section 130, worksite safety. Again, not
12 significant changes from the draft that was sent out for
13 review. Just to let you know, that we had discussed at
14 the last stakeholder meetings what happens with people who
15 don't know that a job is unsafe at the time they are
16 hired. And the input we received was that when somebody
17 accepts a job they should be able to expect that the
18 employer is complying with applicable safety regulations.
19 And if they discover it at the time they're hired or at
20 the time they -- after they take the job or after they
21 begin work, then we'll consider that a deterioration in
22 working conditions.

23 Individuals need to notify their employer about the
24 safety issue and give the employer a reasonable period of
25 time to correct the situation.

1 We've defined what "employer" means. It includes the
2 supervisor, manager or another individual who could
3 reasonably be expected to have authority to correct the
4 safety condition at issue. It's not just telling your
5 coworker or something like that is not appropriate.

6 Reasonable period of time" means an amount of time
7 that a reasonably prudent person would have remained at
8 the worksite or continued working in the presence of the
9 condition at issue.

10 For health or safety issues that present imminent
11 danger of serious bodily harm, bodily injury or death, the
12 employer has to take immediate steps to correct the
13 situation. And if the employer's been issued a citation

14 by a regulatory agency that's charged with monitoring
15 health or safety conditions, then the employer has to
16 correct the citation -- excuse me -- the condition within
17 the time period that's specified in the citation to be a
18 reasonable period of time.

19 Others will be judgment calls, you know, whether a
20 week was prudent or two weeks, depending on the individual
21 circumstance. A lot of these are simply judgement calls,
22 but we do -- the law does require that the individual
23 notify their employer about the safety condition and give
24 them an opportunity.

25 Serious bodily injury is bodily injury which creates

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1 probability of death or causes serious permanent

2 disfigurement or which causes a significant loss or an
3 impairment in the function of any bodily part or organ.
4 And that's taken from a separate section of Washington
5 state code on what's serious bodily injury.

6 Any questions on the worksite safety section?

7 Okay, illegal activities at the worksite. Illegal
8 activities can include violations of both civil and
9 criminal law. Individuals need to notify their employer
10 of the illegal activity and give employer a reasonable
11 period of time to correct the situation. They're not
12 required to notify their employer before quitting when the
13 employer is the person conducting the illegal activity and
14 notifying them could jeopardize your safety or is contrary
15 to other federal or state laws. For example, whistle
16 blower protection laws.

17 The same definition of employer includes your

18 supervisor, manager or another individual who could
19 reasonably be expected to have authority to correct the
20 illegal activity at issue.

21 A reasonable period of time, the same standard. How
22 long would a reasonably prudent person be expected to
23 continue working in the presence of the activity at issue.

24 Any questions about that section?

25 MR. SLUNAKER: 135?

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1 MS. MYERS: Yes.

2 MR. SLUNAKER: I'd just refer you back to the AWB
3 letter. It's still not quite as precise as we would have
4 hoped.

5 MS. MYERS: Okay.

6 MR. SEXTON: I'm sorry, I didn't follow that. Were
7 you saying this wasn't as precise?

8 MR. SLUNAKER: Yes. We -- the AWB submitted a letter
9 back in December. Actually the end of October.

10 MS. GEE: This is the one from last week, though.
11 This is the most recent letter.

12 I'm wondering since you didn't have copies of the
13 AWB --

14 MS. MYERS: I found -- I brought one with me.

15 MS. GEE: Can you read that in --

16 MS. MYERS: Certainly.

17 MS. GEE: -- so they understand what the concerns
18 are? Or how do you want to handle it?

19 MS. MYERS: I can read it in just so you understand
20 what their concerns were.

21 This is the comments from AWB on WAC 192-150-135.

22 "As we stated to you in our teleconference we support the
23 fact that the term 'legality activities' includes
24 violations of both civil and criminal law. Our concerns
25 continue to rest with how the individual reports such

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1 activities to the employer. We believe that when it comes
2 to civil violations such as sexual harassment,
3 discrimination and defamation of character, the individual
4 must report to someone who can actually take action to
5 remedy the situation. It should not be sufficient for the
6 individual to just tell a coworker who can do nothing
7 about the issue. You might consider using the same
8 definition of 'employer' as used in the proposed WAC
9 192-150-130 regarding reporting of worksite safety

10 violations." And we did do that; we added that definition
11 in. "In essence, there should be a distinction for
12 employer reporting between civil unlawful activities that
13 do not represent immediate harm and those of a more
14 criminal nature where reporting to the employer might
15 jeopardize the employee's safety. It is our belief that
16 the individual should be required to inform the employer
17 unless that requirement might clearly jeopardize the
18 safety of the individual or be contrary to other laws,
19 for example, whistle blower protection laws. In the event
20 the circumstances surrounding the unlawful activities
21 might result in danger to the individual or the denial of
22 their rights under other laws, the individual must be
23 required to report the activities to a law enforcement
24 agency or other competent authority in order to receive
25 unemployment compensation."

1 Okay. So what we have in here -- what we have in the
2 rule is basically a different type of phrasing. You say
3 they should be required to report it unless they would be
4 jeopardizing their safety or contrary to other laws. And
5 the way we have it worded is they don't have to if it
6 would. So it's the same concept, just slightly different
7 wording.

8 MR. SLUNAKER: Yeah, it might be a clear rule-writing
9 interpretation.

10 MS. MYERS: Okay.

11 Now, the section that they have to report the
12 activities to a law enforcement agency, there's nothing in
13 the statute that says that.

14 We felt that that was beyond the scope of the statute
15 as it's currently written.

16 Dan?

17 MR. SEXTON: You know, my concerns here have always
18 been to the employee and putting the employee in any harm
19 or any danger or requiring the employee to commit criminal
20 activity. And I think that it should be clear that under
21 no circumstance does the employee have to commit criminal
22 activity to receive UI for good cause.

23 MS. MYERS: Rick?

24 MR. SLUNAKER: We agree. That's not our concern.

25 The point that the AWB referenced that says that if,

1 you know, it's not a good idea for you to tell your
2 employer because it's your employer who's doing the bad
3 activity, who are you going to tell?

4 We had a conversation back and forth about competent
5 authority or officer of the court, whatever the -- the
6 whole point was, if you can't talk to your employer about
7 it, the rule should be specific about who you should go to
8 talk to to get yourself protection for eligibility for
9 benefits. And that's what I think is -- that's the point
10 that's not clear. It's not stated. It's just not -- it's
11 not addressed in that part of the rule. So that
12 essentially if -- as that last sentence in the letter says
13 that if you can't tell your employer, you do have to go
14 and tell somebody in the law enforcement community that
15 there's this problem going on. Then you're protected, and
16 then you can say, "I told the cops; therefore, I should
17 not be disqualified from receiving benefits.

18 MS. MYERS: Okay.

19 Dave?

20 MR. JOHNSON: Just for the record, you know,
21 understanding what Rick just said that the problem that we
22 would have with that is the requirement to go to the
23 authorities. You can almost leave that one up to sort of
24 the Department's determination on a case-by-case basis.

25 And the reason that I say that is I can think of

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1 situations, particularly in the construction industry,
2 it's a pretty tight-knit community. And forcing an
3 individual to call the police or call the authorities on a
4 specific contractor or subcontractor on a job site could

5 place future employment at jeopardy. And I think that the
6 average person -- just speaking for myself, I would call
7 the police. But to protect those out there that wouldn't
8 to make it a requirement to do that, it seems to me in
9 order to be able to draw your unemployment, I mean, they
10 should be able to make that case to you. The employer
11 language is pretty clear, even though employer indicates a
12 specific relationship. It also says any person who could
13 -- or -- supervisor, manager or other individual who could
14 reasonably be expected to have authority to correct the
15 illegal activity. If it's -- if it couldn't be just
16 absolutely said that that would mean the police as well,
17 it's certainly implied that if you can't talk to your
18 supervisor or your manager, you know, you should make an
19 effort to seek out another individual, and if that person
20 can't be found then it's going to have to go to the
21 Department in terms of them saying, "Well, what did you

22 do?" I mean, "Who did you talk to? And if you didn't
23 talk to anybody, why didn't you talk to" --

24 I just have a real concern with making it a mandatory
25 requirement that if you can't talk to them, you have to

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1 talk to a police. There are all sorts of situations that
2 could surround that where a person could be putting
3 themselves in more harm from another direction by
4 reporting it to the police than they should be reasonably
5 expected to do.

6 MS. MYERS: Okay, thank you.

7 Dan?

8 MR. SEXTON: I agree completely with what Dave said.

9 I have concerns about what Rick said. And I think you
10 alluded to the fact of what the statute says. And I think
11 we got to keep that in mind.

12 But the employee should not be put in harm, should
13 not be put in more harm, and should not be asked to do
14 what the statute doesn't require.

15 And I think what's here is pretty good. I'm anxious
16 to see the AWB letter. And maybe this could be tweaked
17 around some. But I can what's here goes to the intent.

18 MS. MYERS: Thank you.

19 Rick?

20 MR. SLUNAKER: We may have a catch-22 here. The law
21 does not protect workers who leave work alleging illegal
22 activity unless they reported it to the employer. The
23 proposal that the business community is saying is we're
24 willing to allow a rule that goes beyond what the statute
25 says. If you feel you can't do that, then we obviously

1 need to correct it. The law is very clear. You don't get
2 benefits if you're alleging there was an illegal activity
3 unless you told the employer. You're out. The rule that
4 we're proposing to support would say, "Okay, if it was the
5 employer that was doing it and you felt uncomfortable, go
6 tell law enforcement, and your rights are going to be
7 protected." If the position is going to be you still have
8 to report to the employer, let's just be clear about it.
9 Some employees are not going to get benefits because they
10 didn't feel comfortable because it was the employer
11 undertaking the illegal activity. That's not what we
12 intended. I don't think that's what the legislature

13 intended. If you tweak the rule to say, "If you don't
14 feel comfortable telling your employer, go to some other
15 competent authority like law enforcement, and your rights
16 will be preserved," we're okay with that. It still is a
17 agency activity, but without that additional condition,
18 those workers are going to be cut out cold. That's not

19 what we intend.

20 MS. MYERS: Okay. Thank you.

21 Dan?

22 MR. SEXTON: Juanita, just to bander back and forth a
23 little more, I disagree with Rick. And I'm looking for
24 the section in statute -- I know we had --

25 MR. SLUNAKER: Page 7, line 29.

1 MR. SEXTON: I know we had some discussion at one of
2 the hearings. The individual left work because of illegal
3 activities at the individual's worksite. The individual
4 reported such activities to the employer, and the employer
5 failed to end such activities within a reasonable period
6 of time or -- or -- you know. And I think --

7 MR. SLUNAKER: No, Dan. Read number 10.

8 MS. MYERS: Okay, hold on.

9 MR. SEXTON: Or the individual's usual work has
10 changed to work that violates the individual's religious
11 convictions or sincere moral beliefs. Well, you know, I
12 still think the "or" is a loophole there. And I still
13 think that the language in the rule is pretty good. I'm
14 anxious to see the AWB letter. I think it goes to the
15 intent. I think we can work with this.

16 MS. MYERS: Okay, Rick.

17 MR. SLUNAKER: The "or," Dan, conjoins an entirely
18 different idea. It's -- number 9 is illegal activities.
19 Number 10 is moral beliefs, having nothing to do with
20 legality.

21 The point that I'm making is that I believe the
22 legislature intended to say if a worker leaves because
23 there is illegal activity going on, they're protected.
24 They also intended to have the responsibility rest with
25 the employee to report that activity. If it was a

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1 coworker, it's clear. The words in the bill say you got
2 to tell the employer. If the employer is the one
3 undertaking the illegal activity, the bill unfortunately

4 is silent about that. And I understand what the agency's
5 position is.

6 What the business community is telling you is that
7 we're willing to support a rule that says if you report it
8 to somebody else other than the employer, you are still
9 going to have that protection. You're still going to get
10 the benefits. Without that, those people are not going to
11 get the benefits. It's pure and simple. It's a catch 22
12 for them. If the employer is doing the illegal activity,
13 they don't want to report the employer and they leave,
14 they're out.

15 MS. MYERS: Okay, thank you for your input.

16 Dave?

17 MR. JOHNSON: I'll try and keep it brief. You know,
18 I appreciate what Rick's saying. My concern is with a lot
19 of individuals that are out there on the job sites, and
20 they maybe don't have the conviction or they don't have --

21 there's a fear factor involved in whether or not they can
22 actually -- what's going to happen to them if they go to
23 the authorities. And as I stated before, in some cases
24 the contracting community is a closed community. And just
25 that -- even if the contractor is performing an illegal

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1 activity -- can stop that individual. And you're right,
2 it's a catch -- it's problematic. Because I think we're
3 going to have people who are being exposed to illegal
4 activity. Or the potential exists for people that are
5 being exposed to illegal activity from their employer who
6 through fear won't go to the authorities and will have to
7 quit the job and will be denied benefits. So that may in

8 particular be an area that we need to focus on before the
9 permanent rule goes into effect. I mean, I appreciate
10 that that's kind of a caveat that the business community
11 would put out there to relieve that. I don't think it's
12 going to catch it. I think if it's bad enough that this
13 person can't go to the employer, they're going to have
14 serious concerns about going to the police or somebody
15 else. So I don't know how it gets fixed, but I don't
16 think a requirement to make them do that is going to fix
17 the problem.

18 MS. MYERS: Okay, thank you for your comments.

19 Dan?

20 MR. SEXTON: If I may, just to further flog this, I
21 don't think there was any intent by the legislature to say
22 that employees had to report criminal activity to their
23 employer that was committing the criminal activity. I
24 think we had a lot of discussion on that in the hearings.

25 I think there was agreement on that. I think the rule --

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1 the proposed rule reflects that.

2 I'm willing to take a look at the AWB letter. I'm

3 willing to, you know, look at this and think about that.

4 But, you know, clearly I do not believe and I don't think

5 any reasonably prudent person would agree that there was

6 any intent by the legislature to say that employees had to

7 report criminal activity committed by their employer to

8 that employer.

9 MS. MYERS: Thank you for your input. One more,

10 Rick, and then we'll move on.

11 MR. SLUNAKER: Unfortunately that's what the bill

12 says. And we can try to get inside anybody's mind.

13 The point I'm making, and the point that the AWB
14 letter says, is that if the worker is uncomfortable
15 reporting to the employer for whatever reason, if the
16 employer's doing it or whatever, they report to a law
17 enforcement or other competent authority that the agency
18 can determine -- I'll use that construction example. The
19 worker feels that the employer is intentionally not paying
20 prevailing wages, they can go right across the hall here
21 to the Department of Labor and Industries and say, "You
22 know, they know I know I told them, and I am
23 uncomfortable, and I am leaving." In that case you would
24 be perfectly -- if you had that rule, you would be
25 perfectly within the bounds to say that qualifies and

1 you're eligible to receive unemployment comp. Without
2 that caveat, that person is out in the cold. They got no
3 job. They got no unemployment benefits.

4 MR. JOHNSON: Then why couldn't it be then that when
5 they quit their job due to this illegal activity and
6 they're reporting it to the Employment Security Department
7 or if they do report it to the Employment Security
8 Department, why wouldn't that suffice as a part of that
9 agency in making the determination?

10 MR. SLUNAKER: That's what I'm saying. The business
11 suggestion is to allow the person to report to a law
12 enforcement agency or other competent authority. And the
13 Department can determine, okay, in what circumstance is a
14 competent authority?

15 If it's a prevailing wage thing, they shouldn't be

16 talking to Employment Security; they should be talking to
17 Labor and Industries. If it's a health and safety, they
18 should be talking to WISHA. If it's nothing else --
19 there's a whole long list of competent authorities, but
20 right now the rule doesn't allow you to do that.

21 MS. MYERS: Okay, I think we've got the input on both
22 sides on this particular one. Can we move on to the next
23 section?

24 MR. SLUNAKER: Please.

25 MS. MYERS: Okay. Change in usual work that violates

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1 religious or sincere moral beliefs. This is fairly
2 substantially changed from the draft that went out.

3 The law says that if your usual work is changed to
4 work that violates your religious or sincere moral
5 beliefs, you have good cause for leaving work. We've
6 defined what "usual work" means. And it's your job duties
7 or the conditions of your work that were originally agreed
8 upon by you and your employer in your hiring agreement, or
9 that are customary for workers in your job classification,
10 or you consistently performed during your base period, or
11 that were mutually agreed to by you and your employer
12 prior to the employer action that changed your job duties.

13 Section (2) is the one that has changed. We've added
14 a new subsection (3). The following criteria will be used
15 to determine whether you had good cause for quitting work
16 under this section.

17 First, of course, the change in your usual work must
18 be the result of action taken by your employer. The work
19 must require you to violate your religious beliefs or

20 sincere moral convictions. Mere disapproval of the
21 employer's method of conducting business is not good cause
22 for leaving work. You must request alternative work from
23 your employer unless doing so would be futile. Worker
24 activity must directly rather than indirectly affect your
25 religious or moral beliefs. Any objectionable condition

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1 must exist in fact rather than be a matter of speculation.
2 We've added a new subsection (3). You will not have
3 good cause for quitting work under this section if you're
4 inconsistent or insincere in your objections, the
5 objection is raised as a sham or a means of avoiding work,
6 or you knew of the objectionable aspects of the work at

7 the time you were hired, or you continued working under
8 the objectionable conditions.

9 We received some comment that this section of the --
10 that this rule was not as we had it originally drafted
11 really didn't provide any guidance. While it defined
12 "usual work," it didn't put out any criteria around the
13 concept of sincere -- religious or sincere moral beliefs.
14 So we looked at other states that had a statute that was
15 similar to ours, and Alaska's statute is almost identical
16 in wording. So these examples or this wording was largely
17 lifted from the case law that Alaska has developed along
18 the lines of religion or sincere moral beliefs.

19 Any questions, comments about what we have there?

20 Dan?

21 MR. SEXTON: Well, yeah. This is the first time I'm
22 seeing this, this new language here.

23 MS. MYERS: Correct.

24 MR. SEXTON: And I don't think I like any of this
25 here. And I don't think it's necessary. And I think it

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1 goes against -- the words in the statute are pretty plain
2 and simple. The individual's usual work was changed to
3 work that violates the individual's religious convictions
4 or sincere moral beliefs. I think this is a, you know, a
5 fairly substantial change to that. I think we'll hear
6 more on this.

7 MS. MYERS: Okay. Thank you.

8 Further comments?

9 MR. SLUNAKER: It seems to address our concerns. It
10 seems to address the business community concerns.

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11 MS. MYERS: Thank you.

12 Okay, the next area we're going to talk about is the
13 next section 150. When is a separation considered a
14 refusal of new work?

15 On the back table there was a copy of a letter that
16 the Department had sent to Mr. John Humphrey who's the
17 acting regional administrator of the U.S. Department of
18 Labor, region 6. Attached to that is a letter that the
19 Department received from the Department of Labor
20 expressing concerns about a potential conformity issue
21 that was raised by the legislation. They had indicated
22 that under the Federal Unemployment Tax Act or FUTA states
23 cannot deny unemployment compensation to any otherwise
24 eligible individual who refuses to accept new work if the
25 wages, hours or other conditions of the work offered are

1 substantially less favorable to the individual than those
2 prevailing for similar work in the locality. What they
3 were specifically raising concerns about was the
4 requirement that an individual's pay or hours had to be
5 cut by 25 percent or more to constitute good cause for
6 leaving work. And while they said that that particular
7 language doesn't raise a conformity issue, the Department
8 still has to look at whether the change instituted by the
9 employer constitutes a new offer of work.

10 For example, if your employer changes your -- cuts
11 your pay by 20 percent, you don't have good cause under
12 the statute to quit your job. However, that offer of work
13 could be considered an offer of new work by your employer.
14 The definition that they gave in their letter which we've

15 incorporated into this rule says that "new work" includes
16 an offer by the individual's present employer of different
17 duties from those the individual agreed to perform in the
18 existing contract of employment or different terms or
19 conditions of employment from those in the existing
20 contract. What they require that the Department does --
21 or that states do is that when the conditions of
22 employment are substantially changed, the employer --
23 excuse me -- the Department needs to look to see whether
24 the new conditions make the job substantially less
25 favorable for that individual than other jobs in their

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1 occupational labor market area.

2 So in that same example, if the individual's pay was

3 cut by 20 percent, okay, that's a substantial change. If
4 we review and say, "Okay, that is less favorable. That's
5 substantially less now than what other workers in your
6 occupation and the labor market area would receive and
7 pay," then that's an offer of new work. So if the person
8 refused it, it would not be treated as a quit; it would be
9 treated as a work refusal, a refusal of a job offer. And
10 in that particular circumstances, if it is substantially
11 less favorable, then it would be a refusal with good
12 cause. However, if that 20 percent cut in pay still
13 leaves them within the median of what their occupation
14 pays in that labor market area, then it's not an offer of
15 new work; it is simply a change. And if the person quits,
16 it's a quit without good cause.

17 AWB had expressed concerns in their letter that the
18 Department only -- this rule only address cuts in pay or

19 wages and hours and not address other conditions of work.
20 But that is clearly part of Department of Labor's letter
21 is that we have to consider wages, hours and other
22 conditions of work.

23 Their definition of "other conditions of work" is
24 fairly broad. We've incorporated those into the rule.

25 Conditions of work as you'll see includes fringe benefits

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1 such as life and health insurance; paid sick, vacation,
2 annual leave; provisions for leaves of absence, holiday
3 leave; pensions, annuities, retirement; severance pay. It
4 goes on to job security and reemployment rights; training
5 and promotion policies; wage guarantees; unionization;

6 grievance procedures; work rules, including health and
7 safety; medical and welfare programs; physical conditions
8 such as heat, light and ventilation; shifts of employment;
9 and permanency of work.

10 We recognize that that is quite broad. But again,
11 the employer has to have changed your job in a manner that
12 makes the job substantially less favorable to that
13 individual than what is prevailing in that labor market
14 for that occupation. In those limited circumstances, the
15 job would be treated -- excuse me -- the separation would
16 be treated as a work refusal, a refusal of the new work as
17 opposed to a quit.

18 Basically what we're saying in this rule, by adopting
19 the DOL standard is that your employer ended your old job
20 and is offering you a new one. Because it's so much
21 different than your old job, they're offering you a new

22 job. And you're saying "No." Or "Yes." I mean, if you
23 take the job and you continue working, then you can't
24 later down the road decide you're going to quit. Because
25 you accepted the offer of employment. Simply that's the

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1 same as today is if you accept a job offer, and then you
2 decide you don't like the job, if you quit, you've quit if
3 you knew what the conditions were at the time you accepted
4 it. The same here. If your employer proposes these
5 changes, and you accept them and start work, and you quit
6 work, then you've quit probably without good cause unless
7 you fit one of the other factors for good cause.

8 Questions? Dan?

9 MR. SEXTON: Well, what if you thought it was a

10 temporary situation? You weren't told that at the time
11 of, you know, "Go over here and do this" that it was a
12 permanent situation?

13 MS. MYERS: Well, that would be a part of the fact
14 finding between the employer and the employee. It's not
15 really an offer of new work if they were just assigned
16 some temporary duties. And then that later turned out.
17 If the employer then says, you know, "This is permanent.
18 We've decided to make this permanent," I think that is the
19 point when the new job occurs. But if somebody -- and
20 employers are pretty free as to how they can move their
21 employees around on a temporary basis as far as assigning
22 different type of work. But the question of whether the
23 person started work is when it was made clear to that
24 person that that is their new job.

25 MR. SEXTON: So they tell you it's temporary, and it

1 just goes on for as long as you're there.

2 MS. MYERS: Right. Again, that's going to be part of
3 the fact finding.

4 Mr. Slunaker?

5 MR. SLUNAKER: I understand having looked at what the
6 Department of Labor's letter says, I think the business
7 community still has concerns that what the legislature was
8 clearly trying to do was reduce discretion and to define
9 things as clearly as possible. It's obviously difficult
10 to do. But it looks -- you know, it may well be the glass
11 half empty, glass half full. You're at the same spot.
12 I think generally speaking our concerns are that the

13 Department should start with a more narrow approach than
14 you've got now and see what the Department of Labor has to
15 say about that.

16 It appears to take the position that the notion of
17 other conditions of work are on an individual basis rather
18 than what I think the Department of Labor says is that
19 yeah, they're on an individual claim basis, but you also
20 are supposed to look at what the conditions are for other
21 jobs of a like nature in that general area. I'm not sure
22 that's what the rule says. And I think if you took the
23 approach that said that we're going to limit the
24 discretion to -- sort of a two-part test -- what are the
25 particulars of the individual claim in question, and then

1 take a look at, you know, did all midnight store clerks
2 have their hours reduced or something along those lines,
3 it would probably be a little bit more successful in
4 coupling the two notions together.

5 MS. MYERS: Correct. And we can work on the wording
6 because that's certainly what we intended is it's
7 dependent on what's prevailing for the labor market for
8 that individual's occupation.

9 As I think I stated in the teleconference with AWB
10 members, we recognize that this probably was not the goal
11 of the legislation, that we certainly recognize that the
12 intent was to reduce the Department's discretion in
13 determining whether an individual left work for good
14 cause. However, when we get a notification from the
15 Department of Labor that we are out of conformity, we try
16 to find a way that we could implement the statute as it's

17 written and still maintain conformity. We felt that we
18 could adopt rule because there is another section of
19 statute, RCW 50.20.110, which contains the same language
20 that the FUTA legislation talks about prevailing
21 conditions of work.

22 So rather than going over to the legislature and them
23 saying, "This is a conformity problem. You have to fix
24 it," we said, "Okay, we'll try to fix it through rule
25 making," recognizing that this is probably going to be

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1 subject to some litigation, some case law. But it gives
2 us time. Whether it -- we recognize it probably doesn't
3 address all the problems that the business -- some of the
4 business community felt existed with the previous way we

5 did our adjudication, but it buys us time to see if we can
6 -- if other changes can be made to the statute at some
7 point. The Department's not requesting any on this
8 section, but whether other clarification can or should be
9 made to try to rectify this. We're simply not going to
10 say that we can't implement the law because of this
11 conformity issue when we can, when we could figure out a
12 way around it.

13 MR. SLUNAKER: I understand that. I just got an
14 emergency call. I've got to go to my office. We will
15 have some other comments. We'll try to have somebody at
16 the Seattle meeting or we'll communicate those --

17 MR. SEXTON: We'll comment for you.

18 MS. MYERS: Now, is Jan gone for the rest of the day
19 too?

20 MR. SLUNAKER: Yes. I actually was covering for her

21 now.

22 I hope my building's not on fire. It sounds like it
23 may be.

24 MS. MYERS: Okay, the next section 200 is misconduct
25 and gross misconduct.

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1 And the action or behavior that resulted in the
2 individual's discharge or suspension has to be connected
3 with their work to constitute misconduct or gross
4 misconduct.

5 And Rick is leaving here, but I'll speak for him.
6 Subsection (2), AWB had a lot of concerns about the
7 inclusion of the requirement that the action or behavior
8 must result in harm or create the potential for harm for

9 the employer's interests. They felt that the purpose of
10 amending the misconduct statute was to delete the
11 requirement that harm against the employer be shown before
12 the person can be found to have committed misconduct or
13 gross misconduct.

14 Our legal counsel has advised that while it's not
15 stated explicitly that harm is required any longer, the
16 examples that they site as misconduct imply misconduct --
17 excuse me -- imply harm or the potential for harm. If you
18 look at, you know, willful wanton disregard of the
19 employer, insubordination, violation of standards of
20 behavior that an employer has the right to affect, those
21 types of things imply that the employer is harmed by the
22 individual's action. In addition, the existing case law,
23 almost unanimously the state court of appeals and the
24 supreme court have held that harm to the employer needs to

25 be demonstrated before you deny an individual's benefits

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1 for misconduct or gross misconduct.

2 Just to let you know because AWB has some very strong
3 objections to this, we are going to be reviewing this
4 further. We left it in the emergency rules for now. You
5 will certainly be offered the opportunity to participate
6 in any discussions on this topic, but there are going to
7 be some further review and discussions to obtain either
8 input or perhaps, you know, look at, you know, some
9 definitive response to AWB about why we still hold the
10 position we do, or if we change our position, which may
11 happen but likely, but it could, why we changed our
12 position. But just to let you know that there's going to

13 be ongoing discussions on this particular topic.

14 Mr. Johnson?

15 MR. JOHNSON: And we'd like to be included at
16 whatever level we could be. And I can -- I'll throw our
17 position out at this point.

18 To leave the employer in a position where he can
19 subjectively weed out employees based on what he sees as
20 potential harm to his company is from our point of view
21 opening the door to allow the employer to lay off any
22 employee for a variety of reasons or fire them for a
23 variety of reasons listed under misconduct and relieve
24 themselves of their unemployment burden. And for that
25 reason, we don't want to see the employer harmed before

1 this can happen, but we absolutely need to protect the
2 worker from those employers that would unethically
3 discharge an employee to relieve themselves of their
4 burden to the Department and to that employee by either a
5 fabrication or a stretching the truth or, you know,
6 linking circumstances that you would say, "Well,
7 ultimately this is going to harm me, so he's -- so this is
8 misconduct." It's so broad that -- I mean, it's beyond me
9 that the Department would go there.

10 I understand what the AWB would like to see, and
11 that's giving the contractor total discretion over what he
12 considers to be misconduct, which may not be.

13 MS. MYERS: Okay.

14 MR. JOHNSON: And would urge the Department to
15 maintain the language that they've got in here even though
16 we're not happy with the misconduct language even being in

17 there. It is in statute now. But your interpretation of
18 it is at least, you know, objective. And we appreciate
19 that.

20 MS. MYERS: Okay.

21 MR. ABBOTT: I agree with Dave on this. We see this
22 as a potential for -- instead of a lack-of-work layoffs
23 since the construction industry and the contractors
24 especially are getting a rate increase that they're going
25 to have to offset this with the potential of misconduct as

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1 well. So they're going to have a big layoff. They're
2 going to have a big misconduct. Instead of a downsize in
3 workforce, they're going to have misconduct all in one

4 day, or over a week's period of time, however you want to
5 look at it. But without some type of guidelines there,
6 there's nothing there from stopping that from happening.

7 MS. MYERS: Thank you.

8 We'll move on to the next section, definitions.

9 Again, just to let you know that the AWB had some
10 concerns regarding the definitions that we've proposed.

11 We looked at these definitions based on -- we used
12 the dictionary. We used the Black's Law Dictionary. We
13 looked at some case law, et cetera, to come up with these
14 definitions. AWB has concerns that particularly the
15 definitions of "willful," "wanton" and "flagrant and
16 wanton" are too narrow, that people wouldn't qualify for
17 misconduct based on these definitions. But this is what
18 we have.

19 Particular concerns, they raised about the definition
20 of "flagrant and wanton." For those of you who are

21 fami liar with the statute, there's now discretion between
22 what's misconduct and what's gross misconduct. And gross
23 misconduct has two definitions. It is either criminal
24 activity and related to their work, or it's flagrant and
25 wanton behavior.

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1 And what we have defined here is -- quite frankly the
2 case law on this subject is very limited. There's really
3 nothing -- because it hasn't been in our law before. I
4 think we looked at a couple of workers' comp decisions
5 from Oregon I think that defined what was flagrant and
6 wanton to come up with this definition.

7 Basically because the penalty for flagrant and wanton

8 behavior is so much higher than for regular misconduct.
9 This is the one where all the wages from that employer are
10 stricken or 680 hours of wages are cancelled from that
11 claim. We felt it needed to be pretty -- and it's equated
12 with criminal activity. We felt it had to be fairly bad
13 behavior, and not just normal misconduct. It had to be
14 something that's conspicuously bad or offensive and it
15 shows, as we put here, contemptuous disregard for the law,
16 morality, or the rights of others. And it has to be so
17 obviously inconsistent with what is right or proper that
18 it can neither escape notice nor be condoned.

19 And we had a heck of a time coming up with some
20 examples for our staff as to what would be -- what would
21 rise to the level of flagrant and wanton behavior. And
22 the couple we came up with was, for example, we had a --
23 these were based on actual cases prior to this which were

24 just determined to be misconduct. But for example, we had
25 an individual who was a truck driver/delivery driver for a

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1 company who, you know, that had the stickers on the back
2 of your truck "How am I driving? Call this number." And
3 the employer got a call about the person's erratic
4 driving, and when the employee showed back up at work the
5 employer called him in and spoke to him about his driving.
6 And the employer -- the individual got angry, got back in
7 the truck, and drove out of the lot, and was later called
8 in for not just driving erratically, but he was drinking
9 in the truck at the time. We felt that was flagrant and
10 wanton because he was doing it immediately after being
11 warned.

12 The other example -- so if it was under the new law,
13 we gave it as an example of what could be flagrant and
14 wanton behavior.

15 The other example we had was an individual who worked
16 in a department store and was -- had set up a tape to tape
17 people in the dressing room, took those tapes and put them
18 on the Internet. We felt that was pretty flagrant and
19 wanton behavior.

20 But, you know, it's a fairly uncommon action, and it
21 has to rise to a pretty extreme level of misbehavior to
22 constitute flagrant and wanton disregard of the employer's
23 interests.

24 Yes, Dave?

25 MR. JOHNSON: Could you just redefine the difference

1 between misconduct and gross misconduct? Gross misconduct
2 involves criminal activity?

3 MS. MYERS: Or flagrant and wanton disregard of the
4 employer's interests.

5 MR. JOHNSON: And misconduct would -- did you have
6 any sort of definition for that?

7 MS. MYERS: Well, misconduct is defined in statute.
8 And it's -- where we have defined here, it's willful or
9 wanton disregard of the employer's interests. It's
10 carelessness or negligence that could result in serious
11 bodily harm for the employer or coworker. It's -- let's
12 see where's my statute here.

13 MR. SEXTON: What page is that?

14 MS. MYERS: It's on page 8 of the statute.

15 Deliberate violations or disregard of standards of

16 behavior which the employer has the right to expect of an
17 employee, or carelessness or negligence of such a degree
18 or recurrence to show an intentional or substantial
19 disregard of the employer's interest. And then it gives
20 -- the statute gives a number of examples, which includes
21 insubordination, repeated inexcusable tardiness,
22 dishonesty related to employment, repeated and inexcusable
23 absences, deliberate acts that are illegal or provoke
24 violence or violation of laws or violate the collective
25 bargaining agreement, violation of a company rule if the

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1 rule is reasonable and the claimant should have known
2 about it.

3 Oh, let's see.

4 MR. JOHNSON: So everything that you have listed here
5 in 1 through 6 could be considered -- if you were
6 terminated for misconduct, all of these things would
7 apply. But in order to be terminated for gross conduct --

8 MS. MYERS: It has to be flagrant and wanton or a
9 criminal act.

10 MR. JOHNSON: Or a criminal act. I got'cha. I was
11 just trying to differentiate between the two.

12 MS. MYERS: Yes. Okay.

13 Dan?

14 MR. SEXTON: Well, going back to the statute, the
15 definition of "gross misconduct" means a criminal act in
16 connection with an individual for which the individual has
17 been -- okay, you read down here, and then eventually
18 there's a couple of "or"s.

19 My question is: The first thing it says is a
20 criminal act.

21 MS. MYERS: Right. It says a criminal act in
22 connection with an individual's work for which the
23 individual has been convicted in a criminal court or has
24 admitted committing or conduct connected with the
25 individual's work that demonstrates a flagrant and wanton

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1 disregard of and for the rights, title or interest of the
2 employer or a fellow employee.

3 So there are two pieces to that.

4 Okay, the next section 210 simply defines or adds
5 some definition around some of the terms. For example,
6 where it says repeated inexcusable tardiness, what that

7 means -- because what is inexcusable, you know, it's
8 something that, you know, they're unjustified or that they
9 wouldn't cause a reasonably prudent person in the same
10 circumstances to be tardy. For example, just your -- you
11 know, you continually say your alarm didn't go off on
12 time. That's probably not reasonably -- I mean, that's
13 not a good cause. But, you know, there could be other
14 circumstances where most people in that circumstance could
15 be late for work. Maybe it's wintertime and you live in a
16 area that has real heavy snowfall, and a lot of people are
17 late to work by about an hour because of road conditions.
18 The employer can't single you out and say, "You're fired
19 for tardiness, but everybody else is okay" for the same
20 reason.

21 So this section, as I said, just indicates some
22 definitions around those different terms.

23 Larry, you had a question?

24 MR. STEVENS: Well, I'm just reading that section on
25 page 19. Is there somewhere in the statute that says you

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1 must have been warned at least twice? Or is that totally
2 within the rule?

3 MS. MYERS: Okay, the statute says for tardiness, it
4 says --

5 MR. SEXTON: Where are you at?

6 MS. MYERS: Page 8, line 26. It says, "Repeated
7 inexcusable tardiness following warnings by the employer."
8 Because it's plural, we said warnings means at least -- it
9 means two or more. And that's the only section where the
10 employer has -- they indicated the employer has to warn

11 the employee first. It's the repeated inexcusable
12 tardiness.

13 Dan?

14 MR. SEXTON: You know, I haven't found the section
15 here in the statute yet. You'll probably tell me where it
16 is.

17 (3) speaks to repeated and inexcusable absences. And
18 down here it says, "Previous warnings from your employer
19 are not required" in that one.

20 MS. MYERS: Because under --

21 MR. SEXTON: That's what it says in the statute?

22 MS. MYERS: Well, what -- yeah. If you look on page
23 8, also on line 31, 32, it just says, "Repeated and
24 inexcusable absences, including absences for which the
25 employee was able to give advance notice and failed to do

1 so. "

2 MR. SEXTON: And you think that says the same thing?

3 MS. MYERS: Well, because lines 26 and 27 when it
4 speaks about tardiness speaks about warnings for the
5 employer. It does not say warnings by the employer for
6 absence. So yes, that implies to us that there was a
7 distinction intended.

8 MR. SEXTON: Well, I don't know. I'm still mulling
9 this over.

10 MS. MYERS: Well, you can certainly send us comments
11 later if you'd prefer.

12 MR. SEXTON: I suppose. It seems -- you know, I'm
13 concerned about where, you know, a policy wasn't in place

14 and then after the fact the employer says whatever the
15 employer says.

16 MS. MYERS: Correct. Now, there would still need to
17 be I would think some kind of -- well, it's a little
18 different if somebody simply stops showing up for work.
19 Usually I would think there's at least an implied policy.

20 But if they didn't know who they were supposed to
21 notify. For example, they called and told the secretary
22 that they were going to be out that day, and the employer
23 said, "You should have told me. I'm the one you should
24 have told, and you didn't tell me, so you didn't give
25 adequate notice," well, the person -- if that's not

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1 written and they were never told about that, then that may

2 be -- fall under the company rule as reasonable section.

3 Again, it's going to be fact specific.

4 MR. SEXTON: Well, was just going to say, you know,

5 I've probably been fired for most every reason there is.

6 So, you know, I can probably go to my own history.

7 You know, I was fired once for repeated inexcusable

8 absences, and I probably been fired for most things I

9 imagine. But I remember this one time, this time that I

10 was fired for repeated and inexcusable absences, work was

11 very slow, and they had more employees than they had work

12 for. And I had an agreement, an understanding with my

13 supervisor that, you know, "If you weren't needed here,

14 there wasn't work for you, you know, go fishing, go to the

15 ball game, whatever." And then I -- then the new team

16 came in later, and then all of a sudden it was, "Well,

17 we're firing you because, you know, you missed this, this

18 this, this, and this day, and we're saying it was
19 inexcusable." So I'm concerned about, you know, the
20 policy, and if there's, you know, not any policy in place,
21 you know, the employer can say whatever they want at some
22 point in time.

23 MS. MYERS: Right. But whether that was inexcusable
24 or not, we would certainly say to you, "But you had an
25 agreement with your employer at the time that those were

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1 excusable absences." So whether the employer warned you
2 or not is secondary as to whether those absences were
3 inexcusable or not. Because in the circumstance you've
4 described, you and your employer at the time had agreed
5 that you would be gone during those days.

6 What we were talking about -- say, for example, if an
7 individual works so long for a period of time, and then
8 just decides "I'm not showing up this week because I'm
9 going to Vegas." Well, the employer shouldn't have to
10 have warned that person that that was inappropriate, that
11 they just decided on their own to take off for a week
12 without any request for leave or without any notification.

13 So again, I mean, cases are going to be fact
14 specific.

15 MR. SEXTON: My only thought here is that the rule,
16 you know, kind of -- there's more in the rule than there
17 is in the statute. And I don't know if, you know,
18 previous warnings from your employer are not required but
19 your repeated absences must have been the immediate cause
20 of your discharge, I don't know if all of this is
21 necessary.

22

MS. MYERS: Yes?

23

MR. ABBOTT: I've got a question on the -- going back

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to the first section where it says either verbal or in

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writing. If the employer gives you two verbal warnings of

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being late, he says, "I fire you because of your second

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verbal warning," is he going to have to have some type of

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documentation showing when the first verbal warning was?

4

Or can an employer just say I've given this person two

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verbal warning and I'm terminating because of that? And

6

when I come back to appeal as a member, I'm going to say,

7

"Well, where is my other day at? I never was given

8

anything." And so if it's just a verbal warning, how is

9

that -- when's the date and the documentation going to be

10 for that specific date?

11 MS. MYERS: And that's just going to be part of our
12 fact finding. We usually ask the employer when were they
13 warned. Because -- and again, it's going to be to the
14 credibility and the weight of the evidence as to whether
15 the employer can demonstrate -- because a lot of times
16 they'll say, "Well, I think" -- if they say, "I think I
17 warned him, but I'm not sure," that's probably not going
18 to be enough. But if they said, you know, "I warned him
19 on such and such date, and I noted it in their personnel
20 file that I gave them a verbal warning," then yeah, that
21 probably would be accepted. But there's no requirement
22 that the employer has to give written warnings. And while
23 some occupations do that, I think that's -- other
24 occupations they don't. They just give them, you know,
25 "I'm putting you on notice that if you keep being late,

1 I'm going to have to let you go."

2 So again, a lot of these decisions are going to be
3 fact specific.

4 It's noon. How do you want to handle this? Do you
5 want to come back after lunch? Take a -- plow through
6 or --

7 MR. SEXTON: How long do you think we have?

8 MS. MYERS: Well, we've already discussed the maximum
9 benefits payable. We're just about through with
10 misconduct. We do have the job search monitoring program.
11 And then primarily --[colloquy perhaps take out]

12 UNIDENTIFIED: Why don't we plow through.

13 MS. MYERS: We're through the hard ones. I think if

14 we plow through, we should be done by before 1:00.

15 THE REPORTER: Well then if we're going to do that,
16 please give me a break, and then we'll --

17 MS. MYERS: Okay. Fingers got tired? Ten minutes?

18 THE REPORTER: That'll be fine, sure.

19 (Recess taken.)

20 MS. MYERS: All right, let's move on. Page 20, WAC
21 192-150-220, discharges for gross misconduct or for felony
22 or gross misdemeanor.

23 Some of the definitions: Criminal act, of course, is
24 fairly simple. It's any action defined as a crime by the
25 applicable state or federal statutes.

1 The area where we had some discussion was under a
2 competent authority. It may be a court, a prosecuting
3 attorney, law enforcement agency, administrative law
4 judge, regulatory agency or professional association, any
5 other person or body other than your employer who has
6 authority to administer disciplinary action against you.
7 It could be your union.

8 What we've said in here is an admission to your
9 employer or to an employee of the Department that you have
10 committed a criminal act is not considered an admission to
11 a competent authority.

12 AWB is fairly concerned that they want the Department
13 to consider themselves a competent authority. However, at
14 least to date, this is an area where the Department is not
15 willing to get involved. Because we feel that if we
16 accept an admission -- for example, if a person said, "I

17 stole something, we admit it," and they admit it to us,
18 and we take that as a fact and it goes into something
19 else, that it may result in our staff having to be --
20 testify as witnesses in other legal proceedings, and
21 that's something we don't want to get involved in.

22 So we have not been a competent authority for the
23 purposes of admissions of criminal act in the past, and at
24 least now we don't anticipate being competent authorities
25 in the future.

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1 Dan, you had a question?

2 MR. SEXTON: Yeah. And I don't know if I want to go
3 there. So never mind.

4 MS. MYERS: Okay. Section (3) talks --

5 MR. SEXTON: But I agree.

6 MS. MYERS: Section (3) talks about cancelling wage
7 credits. And this is something I discussed earlier. If
8 your claim is effective prior to January 4th, if you've
9 been discharged because of a felony or gross misdemeanor
10 connected with your work, all of your hourly wage credits
11 based on that employment since the beginning of your base
12 period will be cancelled. However, if your claim is
13 effective January 4th or later and you're discharged for
14 gross misconduct connected with the work, which remember
15 can be either a criminal act or flagrant and wanton
16 disregard of your employer's interests, all your hourly
17 wage credits based on that employment since the beginning
18 of your base period will be cancelled. And if your wage
19 credits with that employer are fewer than 680 hours, the
20 balance of wage credits up to 680 hours will be cancelled

21 proportionately among your base period employers according
22 to each employer's share of your base period wages. If
23 you only have one other base period employer, that's
24 fairly simple. But I know a lot of occupations, certainly
25 construction you will have many, or at least several base

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1 period employers. And so we have developed a formula that
2 we would apply to those base period and, say, if you had
3 to subtract 400 hours, we would do it in proportion, an
4 equal amount from each employer, or a proportional amount
5 from each employer to be cancelled. And we'll see how
6 that goes. We don't get many of these a year. We get,
7 what, about 50 a year total.

8 MS. METCALF: Under.

9 MS. MYERS: Under 50 a year. But it does happen that
10 people are -- and we don't know if there will be more or
11 not with flagrant and wanton disregard of -- if that will
12 increase the criminal acts piece or not. We don't know.

13 Okay, any questions about misconduct or gross
14 misconduct before we move on to job search monitoring?

15 Yes, Larry.

16 MR. STEVENS: I'm reading slow here, but the tail end
17 of that last section of cancel wage credits says wage

18 credits may only be canceled based upon an admission of a
19 criminal act if you admit to each and every element of the
20 criminal act. Is that in the statute? Is that --

21 MS. MYERS: That's actually -- it's not in the
22 statute. It's in our existing rule. It's been there for
23 years and years.

24 Okay. Job search requirements. This one is amending

25 an existing regulation. So it's fairly easy. The

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1 underscored areas are the ones that are added.

2 Section added to (1)(c) is simply -- it's not
3 actually necessitated by the legislation because it was
4 simply an oversight when we drafted the rules the first
5 time around. Obviously somebody who's on strike or locked
6 out by their employer under the statute -- another statute
7 does not have to look for work. So we've just included
8 that, that exception in here.

9 The job search requirements for most people are
10 different. If they're for claims effective prior to
11 January 4th, an individual has to make three employer

12 contacts or participate in one documented activity at
13 their worksource office or local reemployment center.

14 For claims effective January 4th and later, they have
15 to either do three employer contacts or three documented
16 in-person activities at their worksource office or a
17 combination of employer contacts and in person.

18 So you could do two employer contacts and one
19 documented activity or one and two or however they wanted
20 to do it. But there have to be three activities within a
21 week.

22 The next page, subsection (c). The law also requires
23 -- the change in the law says that if an individual is a
24 member of a referral union, they have to comply with their
25 union's dispatch requirements to be eligible for

1 unemployment benefits for any week.

2 So we've added in here that to be -- if you're a
3 member of a referral union, you have to be in good
4 standing with your union, eligible for dispatch, and
5 comply with your union's dispatch or referral
6 requirements. And your benefits could be denied for any
7 weeks in which you failed to meet those requirements and
8 you may be directed to seek work outside of your union.

9 Now, the unions essentially act as the Department's
10 representative in monitoring the job search activities of
11 their members. And so in order to comply with those
12 requirements, then the individual has to be in good
13 standing with their union, because otherwise the union is
14 not going to -- they're not eligible for dispatch. To be
15 exempt from our job search requirements and be available

16 for a referral through your union, you have to do what
17 your union requires. If you don't, then we'll say, "Okay,
18 then you need to look for work like other claimants if
19 you're not going to comply with your union's dispatch
20 requirements." So we could say to you, "Well, then you
21 have to look for, you know -- you have to look for work."
22 Because we do -- we send out a notice whenever somebody
23 applies for benefits that says so and so has applied. We
24 send it to the union and say, "This individual's applied
25 for benefits. Are they in good standing and eligible for

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1 dispatch?" If you return that and say "no" to either of
2 those questions, we would contact the claimant and say,
3 "You need to look for work on your own then if you're not

4 in good standing and eligible for dispatch with your union
5 hall. Okay?

6 And the rest is fairly technical stuff. But it's
7 just what intrastate claimants, people in this state, if
8 they're -- an in-person job search activity is something
9 that we have to document in our internal tracking system
10 where we document the services that we provide the
11 claimants.

12 Any questions on this section? No? Okay.

13 Tracking of job search activities. Individuals are
14 required to keep a log of their job search contacts unless
15 they are members of a full referral union, allowed
16 benefits because they left work to protect themselves or a
17 member of their immediate family from domestic violence or
18 stalking, or they're exempt from job search requirements,
19 which essentially means people that are in training, on

20 strike or lock out or otherwise attached to an employer or
21 they're on standby or something.

22 And the rest of that section is not changed about the
23 information that they need to keep in their log.

24 And the question was -- we did change section (4),
25 How long should I keep my log? It used to be for at least

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1 60 days after the end of the benefit year. But as some of
2 you may be aware, we've been in an extended benefits
3 period for quite some time now. And some people are
4 drawing benefits far past the end of their benefit year.
5 And they need to claim -- keep those logs during that
6 extended benefit period also. So until they -- for 60
7 days after they stop receiving benefits is when we're

8 asking them to keep their logs.

9 The next section is just technical changes.

10 And then 025, starting at the bottom of the page,
11 that's where we next have some substantive changes.

12 The new law requires that the Department contract
13 with other states to review the job search activities of
14 Washington claimants who live in those states. And I
15 think right now we've got over 20 states that have
16 expressed interest in contracting with us. And actually
17 surprisingly California said yes. And California is the
18 one where -- is the largest state where our claimants
19 live. In California and Oregon. So we will be looking at
20 contracting with those states to monitor the job search
21 activities of the individuals who live there.

22 The law also says that benefits -- when a person is
23 selected for the job search review program, the benefits

24 will be denied for all weeks in which they fail to meet
25 their job search requirements.

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1 Now, after the discussion at the stakeholder
2 meetings, it was agreed that -- the intent wasn't that the
3 Department require every person to come in with a box load
4 of all their job search activities that they've done for
5 the entire year. We would look at a week as we do now.
6 We say, "Bring in your most recent week." However, if the
7 individual didn't meet the job search requirements for
8 that week that's being reviewed or they can't produce a
9 log or we have reason through the interview process to
10 question their availability, they will be scheduled back

11 for a second interview and instructed to bring all their
12 job search logs for their entire claim. And any weeks for
13 which they do not meet the job search requirements could
14 be denied.

15 We are also asking that individuals -- as you'll
16 recall as part of the legislation, there was a requirement
17 that people filing their weekly claim -- their initial
18 claims and their weekly claims provide the Department with
19 identification or proof of their identity so that we can
20 cut down on some cases of fraud or identity theft. That
21 was vetoed by the Governor simply because it was
22 unworkable in a telecenter type of environment or taking
23 claims over the Internet to do that. But the Department
24 is committed to reducing identity theft or fraud whenever
25 possible. So we are asking since these people are coming

1 in to a job search review anyway, they're coming in in
2 person to meet with us, that they need to be prepared to
3 present proof of their identity at that job search review
4 interview. And that identity proof can be either state or
5 government issued photo identification or two of the
6 following government issued documents, and it gives you a
7 variety of documents that a person can bring in as proof
8 of identity.

9 Now, we're not promising that this will get everybody
10 because certainly our staff are not document verification
11 specialists. But what we find is that every step we take
12 to try to reduce the amount -- or to require additional
13 proof of identity reduces the amount of fraud by some
14 percentage. And so somebody who's selected for a job

15 search interview who doesn't have the appropriate
16 identification or is working off of somebody else's Social
17 Security number would probably simply not show up, and
18 that would cause them to be scheduled for a second
19 interview because they didn't show up of all weeks. And
20 if they don't show up for the all weeks, benefits for all
21 those weeks would be denied because they didn't disclose
22 their job search requirements.

23 So -- and the same requirement would be imposed on
24 people who live in other states. We would ask them when
25 they come to their interview in whatever state that they

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1 live in, that we're asking this -- as a part of our
2 contract, we're asking the state to check their I.D.

3 Dan, you had a question?

4 MR. SEXTON: Yeah. I don't know if I'm jumping ahead
5 here. But are we on -- it sounds like we're on 030 now?

6 MS. MYERS: It's kind of skipping back and forth, but
7 yes.

8 MR. SEXTON: Okay. So -- well, I got a question here
9 with sub (3). And I just been going over the statute, and
10 maybe there's -- maybe some of this, you know, appears
11 somewhere else. You know, I understand that it says that
12 benefits will be denied for all weeks that you don't
13 provide information. I just read that. But, you know, if
14 you fail to appear for a review of all weeks claimed, you
15 know, just to say that, it seems a little harsh, and it
16 seems beyond statute to me. It seems like, you know,
17 maybe -- maybe it's explainable. And it doesn't say here,
18 you know, if you have an excused absence or, you know, if

19 -- or not. It just says if you're not there, you know,
20 you're out of luck. And I don't see where it says that in
21 statute. So I would think, you know, that that line ought
22 to just be struck. I would think that it's something
23 that, you know, can be figured out. And, you know, if the
24 person isn't showing up, then you're not going to get your
25 benefits.

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1 But then I got more problems here too. If you fail
2 to appear for review of all weeks claimed, that would be
3 my first. Fail to produce your job search logs for all
4 those weeks, that's fine. Or your logs fail to establish
5 that you have met the minimum job search requirements, you

6 know, I think that this might be going beyond statute too.
7 You know, just to arbitrarily say to someone, "Well, your
8 logs didn't make it. We don't think your record keeping
9 is sufficient. You're out of here. You're out of luck."
10 You know, I think there probably, you know, should be some
11 warnings, some communication, some explanation, some, you
12 know, showing the employee what's required of them before
13 you just say, "Sorry, you didn't reach this bar," whatever
14 this bar is.

15 MS. MYERS: And the Department is undertaking a
16 fairly comprehensive public information. We sent notice
17 to all existing claimants in, what, mid-December.

18 MS. METCALF: December 9th.

19 MS. MYER: December 9th. Letting them know about the
20 new requirements that they could be subject -- if they
21 don't appear for their job search reviews, they could be
22 denied benefits for all weeks, that we could review all

23 weeks, and what the penalties are that they need to do
24 this. We're going to send another notice out to claimants
25 who have filed since then, since December 9th.

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1 MS. METCALF: It's next week, tomorrow.

2 MS. MYERS: Tomorrow, okay. And then --

3 MR. SEXTON But someone -- I'm sorry. I'm sorry.

4 I'm rude. I interrupt sometimes. I don't mean to; it's
5 just how I am.

6 But someone who, you know, was working along and then
7 got laid off, you know, the last couple of weeks maybe,
8 you know, before the holidays. They've been busy with the
9 holidays. Maybe they've been busy with the snow. Who

10 knows. But they figured Monday morning, today, they'd
11 come in and they're fine. And now all of a sudden, you
12 know, maybe this was the first time they've been
13 unemployed for a while, got a whole new set of rules out
14 there, a whole new set of circumstances. You've send this
15 information to people who have been filing.

16 You know, my previous comments were about those
17 people who just got laid off. This is a, you know,
18 complete surprise to them. This is brand new.

19 MS. MYERS: Right. And when an individual first
20 applies, we've updated the instructions that our staff
21 give them about what are the requirements for the job
22 search. After they apply, we've updated the claims kit
23 that the claimant gets in the mail has been updated to
24 reflect the new job search information. They get a
25 brochure in the mail that talks about their job search

1 requirements. And then subsequent to that, they get an
2 insert with their checks reminding of their job search
3 requirements. And finally the new question that's going
4 to be asked as soon as we get the system revised will say
5 for those individuals: Did you make your three job search
6 requirements as required? Or something similar to that
7 effect. So it's pretty --

8 MR SEXTON: I completely appreciate everything you
9 just said. I like the fact that new information's going
10 out to those people, and that when they apply they're
11 going to go over this with them. I still think this
12 language is excessive. I still think that, you know, we
13 could probably do away with most everything here, you

14 know, because it should be subjective. And I don't think
15 this language is in any way subjective. You know, if I
16 show up and I forgot my logs, you know, I just forgot
17 them, I just didn't bring them with me. I got that
18 information, but I didn't bring it, I'm denied. That's
19 what it says here, you know. And so I think, you know,
20 maybe we should be able to work with this a little more so
21 we should be able to work with the employee because there
22 might be, you know, situations where the person means well
23 -- you know, just circumstances happen.

24 MS. METCALF: I sat in a room -- this wasn't about
25 the rules, but it was about the process on the monitoring.

1 And we beat this around for hours.

2 The time that they're asked to bring all weeks is
3 their second time. It's never a time. The first time
4 they're asked to bring one week. And the only reason
5 they're asked to bring all weeks is if their first log
6 didn't meet the qualifications, if they didn't show up for
7 the first one or something went wrong on the first one.

8 The second one, if they show up, they don't have all
9 the logs, they'll be -- an issue will be raised to the
10 telecenters, but the person certainly has the right to the
11 interview. They'll go through the whole process. It
12 isn't just like the person doesn't show up, so the
13 decision goes out the next day. There has to be -- I
14 mean, we have all the things that cover the fact finding
15 and the right to due process and all that that goes on.
16 This is just what could happen; if you don't show up, you
17 don't bring us your logs, or you don't meet the

18 requirements --

19 MR. SEXTON: A worst-case scenario.

20 MS. METCALF: Yes.

21 MS. MYERS: So --

22 MR. SEXTON: Cheryl, I appreciate what you've just
23 said. Is that existing policy?

24 MS. MYERS: Yes.

25 MS. METCALF: It's always existing -- yes, it's

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1 always that we give somebody an interview. First we have
2 to notify them that their benefits are in jeopardy. And
3 then we have to give them an interview.

4 MR. SEXTON: Maybe we could tweak this around some --

5 MS. METCALF: To include some of this?

6 MR. SEXTON: --- to reflect existing policy? But I
7 still think, you know, if you fail to appear, you know, it
8 should probably be stricken. But you probably have
9 existing policy that would -- you know, if you fail to
10 appear without a good explanation, or for the second time
11 you fail to appear without a -- something like that I
12 think would probably work.

13 MS. MYER: Okay.

14 MR. SEXTON: Thanks.

15 MS. MYERS: Who was first?

16 MR. ABBOTT: I got a question on the job -- the logs
17 that they're supposed to be keeping. Does every person
18 that file a claim get the log and everything else no
19 matter if they're a member of a full referral union or
20 not?

21 MS. MYERS: No. As it said here, let's see, in the

22 previous sections, page 22, at the bottom, you must keep a
23 record or log of your job search activity contacts unless
24 you're a member of a full referral union.

25 MR. ABBOTT: So when they file a claim and say,

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1 "Here, I'm a member of a full referral union referral,
2 you" --

3 MS. MYERS: They get different work search
4 instructions.

5 MR. ABBOTT: Okay. That's what --

6 MS. MYERS: The work search instructions to the union
7 members are: you must be a member in good standing with
8 your union, you must be eligible for dispatch and meet

9 your union's dispatch and referral requirements. So you
10 get a different work search requirements.

11 MR. ABBOTT: I just had a question on the log. I
12 didn't know if they were getting that too or not.

13 MS. METCALF: Well, they will. They'll get one with
14 the monetary.

15 MS. MYERS: Yeah, they receive one automatically
16 because our computer system doesn't know that they're a
17 union member, but they don't have to keep the logs.

18 MS. METCALF: No. And there's also the letter that
19 comes with it explaining how to use -- it says, you know,
20 if you're full referral union, you do what your union
21 says.

22 MR. ABBOTT: We've been getting questions on that
23 too.

24 MS. MYERS: Okay.

25 MR. HARRINGTON: My question is if you've been

1 scheduled for an interview, either your first one or your
2 second one, but I as the dispatcher call you for work that
3 morning, is it legal to turn down my job offer to attend
4 your review? Or do I go to work and hopefully sometime
5 during the day get a chance to call you and say, "Please
6 reschedule me. I'm working today"?

7 MS. MYERS: Well, the first thing to clarify.
8 Referral union members are not subject to the job search
9 review program.

10 MR. HARRINGTON: At all?

11 MS. MYERS: At all. Full referral union members are
12 not covered. So they wouldn't be selected for a review.

13 And if they are selected for a review by error, and if you
14 contact the worksource office and let them know that
15 you're a full referral union member, they should make that
16 correction.

17 However, getting back to Dan's concerns about missing
18 the appointment for an excusable reason, really the only
19 excusable reason is that the person went back to work.

20 MR. SEXTON: "I was in a car accident."

21 "I'm in the hospital."

22 MS. MYERS: Well then why are you claiming benefits
23 for that week?

24 MR. SEXTON: "It just happened that morning."

25 MR. HARRINGTON: Or, you know, you were hurt during

1 the week that you're scheduled.

2 MS. MYERS: Right.

3 MR. SEXTON: "I ran out of gas on the way."

4 MS. MYERS: Essentially what they're saying to those
5 people, "If you miss your appointment on the day that it's
6 scheduled, you need to show up to the worksource office by
7 Friday." Now, certainly if somebody was in a major car
8 accident, I think there are other considerations. But
9 most people -- we have about a 30 percent no show rate
10 currently for our job search review interviews, and we
11 want to really drastically cut down on that. If
12 somebody's scheduled, they should show up. Unless, again,
13 they've gone back to work or --

14 MR. SEXTON: Job interview.

15 MS. MYERS: Well, even if they have a job interview,
16 if they can't make it that day, they could come in by

17 Fri day.

18 MR. SEXTON: It doesn't say that.

19 MS. METCALF: It does in their letter.

20 MS. MYERS: It does in their letter that they're
21 getting.

22 Okay, the next few sections are simply technical
23 changes, clean up of -- actually all the way through till
24 -- well, I want to talk real quickly about overpayments.

25 Just to let you know --

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1 MR. SEXTON: Where are you at?

2 MS. MYERS: Starting on page 27, the second WAC on
3 that page, 020, overpayments and fault provisions.

4 You're going to be considered to be at fault when the

5 overpayment is the result of fraud, misrepresentation or
6 willful nondisclosure; a discharge for a felony or gross
7 misdemeanor under -- that's the under the previous -- the
8 law effective prior to January -- or the result of a
9 discharge for gross misconduct, then you're considered to
10 be at fault.

11 That's the only change in that particular section.

12 And then when it gets down to -- well, it's actually
13 the next rule, 030, overpayments -- equity and good
14 conscience provisions.

15 The Department will not consider or grant waiver of
16 an overpayment and will not consider or accept an offer in
17 compromise if the overpayment is based on overpayment
18 decision issued by another state; the result of what we
19 call our conditional payments, and that's current policy;
20 or for claims that are effective January 4, 2004, or

21 later, the result of being discharged for discharged for
22 misconduct or gross misconduct. And that's a provision
23 under the statute which we've cited there, 50.20.066,
24 subsection (5), which on your statute is on the bottom of
25 page 10.

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1 It says all benefits paid in error based on this
2 section are recoverable, notwithstanding 50.20.190, which
3 is the waiver statute or 50.24.020 which allows for what
4 we call offers in compromise or any other provisions of
5 this title.

6 So for a example, if you're discharged from
7 employment, and you give us all the facts related to that

8 discharge, and we determine that it was not misconduct, so
9 we allow benefits, but your employer appeals, and we're
10 overturned by the Office of Administrative Hearings that
11 says, "Yes, misconduct was shown and benefits are denied
12 to this claimant," that's an overpayment for the
13 individual, and we can't waive it and we can't accept
14 their offer of compromise because it was misconduct or
15 gross misconduct depending on what they found. So even if
16 the claimant isn't at fault, the statute doesn't contain
17 any language in there about fault or not fault. It's
18 recoverable if it's a separation resulting from misconduct
19 or gross misconduct.

20 And then at the very bottom of that section on the
21 bottom of page 29, the last sentence, "Any overpayment
22 amount compromised" -- oh, excuse me, the wrong section,
23 the wrong sentence. Oh, it's on the bottom of the next
24 page. Sorry. 30.

25 "An offer in compromise will not be approved if the

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1 overpayment was caused by a denial under RCW 50.20.066,"
2 which is the misconduct or gross misconduct statute.

3 UNIDENTIFIED: Where are you reading?

4 MS. MYERS: Page 30, the last section where we talk
5 about -- it's 192-230-100, subsection (5).

6 In this one we've just added a new section that says,
7 "An offer in compromise will not be approved if the
8 overpayment was caused by a denial under RCW 50.20.066,"
9 which is the misconduct statute -- new misconduct statute.
10 So because of the law regardless of the fault of the
11 claimant involved, no waivers, no offer in compromise.

12 UNIDENTIFIED: It's the last sentence where it says

13 50.20.066?

14 MS. MYERS: Yes.

15 UNIDENTIFIED: That is the misconduct --

16 MS. MYERS: That's the new misconduct statute.

17 UNIDENTIFIED: What is the one right before that, the

18 065 --

19 MS. MYERS: 065 is the prior gross -- felony gross

20 misdemeanor law which says if there are people -- claims

21 effective prior to January 4th, if they're convicted of

22 felony gross misdemeanor, that statute didn't say that

23 they couldn't do an offer in compromise.

24 And 070 is fraud. So basically what we're saying is

25 that we wouldn't approve them unless they can show unusual

1 circumstances.

2 But on the new statute we can't. There is no
3 authority. The statute is very clear that those benefits
4 are recoverable if they were made to an individual who was
5 discharged for misconduct or gross misconduct.

6 MR. SEXTON: Without compromise.

7 MS. MYERS: Right, without no offer in compromise, no
8 waiver.

9 MR. SEXTON: That says it?

10 MS. MYERS: Yes. Because the statute it refers to
11 says all benefits are recoverable, notwithstanding RCW
12 50.20.190, which is the waiver statute, or 50.24.020,
13 which is the offer in compromise statute. Okay?

14 The next two sections are technical. And the rest of
15 these rules are -- starting I think at the bottom of page

16 31 are tax rules. We can go through those briefly.

17 Starting at the bottom of page 31, 050, we've just
18 added a section defining simultaneous acquisition.

19 We had in earlier drafts a definition of substantial
20 continuity of ownership. And we had a lot of discussion
21 about that. And we decided because that actual section of
22 the statute doesn't take effect for another year we have
23 time to work on that definition. The Department of Labor
24 and Industries is adopting -- is considering adopting
25 rules that defines substantial continuity of ownership as

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1 is the federal government. So we figured we have some
2 time to see what they come out with so that we can be as
3 consistent as possible for employers to let them know what

4 we all consider a substantial continuity of ownership.

5 MR. SEXTON: That was just what my comment was going
6 to be. I know that L & I is working on it right now. I
7 know that DOR is either working with L & I or looking over
8 their shoulder. And I guess ESD should be also.

9 MS. MYERS: Right. The next section talks about
10 employer reports. The changes are in subsection (2)(c)
11 about the format. The quarterly tax and wage report has
12 to be filed in one of the following formats. We're
13 talking about either electronically or paper forms
14 supplied by the Department or a certified version of those
15 forms. And this is because we get -- we believe it or not
16 get some tax reports that are handwritten on tablets,
17 napkins, backs of envelopes, et cetera. And so we're
18 trying to -- and it makes it very difficult to track the
19 -- accurately input the information we receive when it's

20 received in those types of formats. So while we don't
21 require everybody to use electronic, most companies do,
22 but those who don't have access -- small business who
23 don't have access to electronic versions can certainly
24 still do paper, but they need to use our format or a copy
25 of our format.

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1 And then the rest of that section is housekeeping
2 changes.

3 We've amended the section 025 on application of
4 payments. The statute sets new penalties for employers
5 who fail to apply -- excuse me -- file their tax reports
6 on time. And it also sets up penalties for employers who
7 willfully misrepresent their payroll, and allows the

8 Department to cover their costs of auditing for those
9 employers who willfully misrepresent their payroll. So
10 when we get a tax report, we've changed the order in which
11 the monies will be applied so that first we'll go to
12 offset our costs of the audit and collection, and then the
13 penalties for willful misrepresentation, and then any lien
14 fees, warrant fees, the late tax report penalty, penalties
15 for incomplete reporting or using the incorrect format,
16 the late tax payment penalty, interest charges, and then
17 finally it would be applied to the principle after we pay
18 off all the incidental charges if there are any.

19 Now, what isn't in this section -- we didn't put it
20 in the rule because it's in another statute -- there is
21 another statute that requires that the Department provide
22 technical assistance to employers before assessing
23 penalties. We certainly have done that in the past and

24 will continue to do that in the future. We aren't going
25 -- we don't go out to -- there's a major education

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1 campaign being instituted for employers as to what the
2 penalties are for not filing their tax returns on time or
3 if they're incomplete. And certainly when somebody the
4 very first time that they send one -- an employer sends in
5 an incomplete or late tax report, we would ask them to
6 correct it. What we're talking about penalties is if they
7 -- you know, they do it repeatedly every quarter or they
8 refuse to correct it or it's an ongoing pattern of
9 behavior. But we always would provide technical
10 assistance first.

11 On page 34 we added quite a few definitions of what

12 is meant by an incomplete tax report. Basically they
13 either haven't submitted their entire wage report or they
14 left off some significant information.

15 There are employers who don't report the Social
16 Security number of the worker. That's really difficult to
17 try to track -- to assign those to the correct worker.
18 They don't put the claimant's name or the number of hours
19 they worked or the amount they paid the individual. Or
20 they leave off a significant number of employees or they
21 leave off -- you know, they may have hours for some, but
22 not for the majority of people. Or they don't give us
23 their employer reference number, their UBI number. The
24 incorrect format, of course, is the one that's filed in
25 one of the formats that -- in a format other than what

1 we've allowed.

2 The penalty for filing an incomplete or incorrect
3 format tax report, the statute used to be a \$10 penalty
4 fee. Now it says up to \$250 or ten percent of their
5 contribution, whichever is less. If there's no quarterly
6 taxes due but a tax report is still due -- for example,
7 for one quarter, an employer didn't have any payroll
8 because they were seasonal, for example, and they didn't
9 have any employees or they normally don't have any
10 employees, we still have to -- they still have to send us
11 a tax report. So if it's incomplete or they don't file a
12 complete report, for the first occurrence, again, after
13 warnings, it's \$75 fine. The second occurrence, \$150.
14 And third and subsequent occurrences, \$250. If they file

15 it in the incorrect format, the fine will be \$250 or ten
16 percent of what's left -- what is due. If there is no tax
17 due, they'll either be charged \$150 for the first
18 occurrence or \$250 for second and subsequent occurrences.
19 If they knowingly misrepresent the amount of their
20 payroll, they are liable for a penalty of ten times the
21 difference between what they should have paid and the
22 amount they did pay. So -- and that penalty is on top of
23 what the taxes were that were due. So they owe the taxes
24 that were due plus a penalty of ten times the difference
25 between what they reported and what they should have

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1 reported. And again, they are also liable to the
2 Department for reasonable expenses of auditing their books

3 and collecting those expenses.

4 The rest of the rule regarding when an employer can
5 get a waiver of those penalties are unchanged.

6 The next substantive change is at the bottom of page
7 36, 192-320-075, charges to the separating employer.

8 As I mentioned, when an -- there are certain
9 circumstances in the new statute where all the charges on
10 a claim will be assigned to that individual's last
11 employer, what they call the separating employer.

12 Dan?

13 MR. SEXTON: I'm looking for that section. Do you
14 know where that is?

15 MS. MYERS: Yes. It's section -- it's the bottom of
16 page 30 of the statute, starting at line 33. "When the
17 eligible individual's separating employer is a covered
18 contribution paying base year employer, benefits paid to

19 the eligible individual shall be charged to the experience
20 rating account of only the individual's separating
21 employer if the individual qualifies for benefits under,"
22 and then it gives the two criteria. If they quit their
23 previous job to go to work for that employer, and then
24 that employer lays them off or they're separated from that
25 employer, if that separating employer is the last

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1 employer, a base year employer and taxable, they get
2 charged 100 percent, not the person that they quit from.
3 Or if they quit for some of the good cause reasons, which
4 is the employer cut their pay or hours by 25 percent or
5 more. They moved the work location, the worksite safety
6 issues, the illegal activities at the worksite or change

7 in work that violates their religious or sincere moral
8 beliefs, in those cases all the charges go to that
9 separating employer.

10 It used to be what would happen is the charges would
11 be what we used to call socialized. That employer would
12 get their share of the charges, and then other employers
13 could just ask for relief, and those charges would be
14 socialized and shared among all employers. The new law
15 says no, those charges all would go to that last
16 separating employer under those circumstances.

17 And the intent of that -- my understanding -- is to
18 reduce the amount of what they call socialized costs in
19 the unemployment insurance system and to make those
20 employers who have those factors where they -- you know,
21 unsafe worksites or illegal activities or dramatic cuts in
22 pay and hours, make them liable for those charges as

23 opposed to socializing those costs across other employers.

24 Larry, you had a question?

25 MR. STEVENS: I did. I'm on page 36 of your rules.

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1 In that section there, I just want to make sure I'm
2 reading the right part. In subsection (2) where it says
3 if a claimant quits work because of working conditions,
4 and then it talks about if the employer is the claimant's
5 last employer, a base period employer, and a
6 contribution-paying employer.

7 MS. MYERS: Yes.

8 MR. STEVENS: So this was a guy you were talking
9 about as the last employer who gets nailed?

10 MS. MYERS: Yes.

11 MR. STEVENS: Does that employer have to be a
12 base-year employer?

13 MS. MYERS: Yes. What the statute says is when an
14 individual's separating employer is covered, contribution-
15 paying base-year employer.

16 MR. STEVENS: So if this guy -- this last employer --
17 the employee only works for him for a short while, he can
18 escape that.

19 MS. MYERS: Yes. The way the statute is worded, yes,
20 it applies only to contribution paying base year
21 employers. And it's our understanding that's not what
22 they intended, but that's what it ended up.

23 UNIDENTIFIED: Is this to get at the sham employment?

24 MS. MYERS: I think the intent of this was to get to
25 -- was to try to reduce the amount of socialized costs by

1 making employers who have poor working conditions
2 essentially responsible for paying the benefits paid to
3 those workers as opposed to socializing them across. I'm
4 not certain why the original draft or one of the early
5 drafts that we saw, the bill didn't have the language that
6 their base-year employer was their last employer. And
7 base year was added later possibly because we don't
8 currently have a mechanism for charging people who aren't
9 -- employers who aren't part of the base period. And
10 maybe that was done with that consideration in mind. I
11 don't know what the rationale. But this later version
12 that showed up does say it has to be a base-period
13 employer.

14 And then the last section here on page 37 simply

15 lists the reasonable audit expenses.

16 Again, as I mentioned earlier, an employer who
17 intentionally misrepresents the amount of their payroll is
18 liable for reasonable audit expenses. And we've simply
19 defined in that section what we could include in
20 reasonable audit expenses. The salaries, the benefits of
21 our staff, communication costs, travel costs, airfare,
22 costs of materials and supplies, equipment, collection
23 costs including court costs, and lien and warrant fees, et
24 cetera, and any other costs that we can establish that are
25 directly related to the audit or collection of the

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1 penalties such as the costs of appeal and so on.

2 So there we are.

3 Any questions? Generic questions about the rules
4 that we have here?

5 We're going to try to go ahead with the meeting in
6 Seattle on Wednesday depending on the weather and the
7 winter storm watch.

8 MR. JOHNSON: Is that in Tukwila?

9 MS. MYERS: No. It's actually in Downtown Seattle at
10 400 Mercer, the DSHS building. It's right across from the
11 Seattle Center.

12 MS. METCALF: It's a nice place on a nice day.

13 MS. MYERS: I don't know what it's like in the
14 winter.

15 MR. SEXTON: It's at 9:00 too, right?

16 MS. MYERS: Yes. If you folks have additional
17 written comments you'd like to submit, we would ask that
18 you do so before the end of the month.

19 And then we will be proposing some final rules. And
20 you'll get copies of any secondary drafts that we come up.
21 If we make additional changes -- substantial changes, of
22 course, we will consult. We'll let you know. If there is
23 any change -- particularly the one I know is on the table
24 now is the harm to employer for additional discussion, we
25 will certainly involve labor in any discussions with

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1 business on that topic.

2 MS. METCALF: So quickly, I'd just like to let you
3 know that a part of the legislation requires that we do a
4 study on the voluntary quit portion of this and the
5 differences in what happens. So we have devised largely

6 due to these two (indicating) a new set of issue codes for
7 all of the separating reasons -- allows, denies -- and our
8 adjudicators have to use those on the new claims, and the
9 old issue codes on the old claims. And not only that, but
10 they have to enter another code into our system which says
11 someone on the new law how they would have been -- how the
12 decision would have come out on the old law, whether it
13 would have been an allow or deny. So we'll have all those
14 statistics on this study. And anybody who's interested in
15 being an unemployment claims adjudicator for the next
16 year, come let us know.

17 UNIDENTIFIED: Can we volunteer Dan?

18 MS. MYERS: I don't know. He's been fired a lot.

19 All right, thank you for coming.

20 MS. METCALF: Thank you all very much.

21 MS. MYERS: We're going to go ahead and adjourn.

22 (Whereupon, at 1:04 p.m.,

Jan5mtg. txt

proceedi ngs adj ourned.)

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Empl oyment Securi ty Meeti ng, 01/05/04